Taking Corrigibility Seriously

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INTRODUCTION

When he was seventeen years old, Riley Briones participated in the murder and robbery of a Subway restaurant clerk.[1] After a jury trial, he was found guilty of felony murder and given a mandatory sentence of life in prison without the possibility of parole (LWOP).[2] Over the next two decades, Briones obtained his GED, held a job in the prison, counseled younger inmates, and in general was, even by the government's admission, a "model inmate."[3]

When he was thirty-five years old, the United States Supreme Court decided the case *Miller v. Alabama*, ruling that mandatory LWOP sentences for juvenile offenders are cruel and unusual and therefore prohibited by the Eighth Amendment.[4] The Court based its decision in part on juveniles' general capacity for change, reasoning that their capacity for change makes juveniles less culpable as well as more amenable to rehabilitation.[5] Because a sentence of LWOP presumes that the offender will never be fit to rejoin society, it should be reserved for the "uncommon" or "rare" juvenile who is "irreparably corrupt."[6] Mandatory LWOP sentences deny juvenile offenders the opportunity to persuade the sentencing judge or jury that they are capable of change and do not deserve the LWOP sentence.[7] Briones argued, and the district court agreed, that the decision in *Miller* rendered Briones's mandatory LWOP sentence unconstitutional.[8]

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1 United States v. Briones, 890 F.3d 811, 811-14 (9th Cir. 2018).

2 *Id*. at 814.

3 United States v. Briones, 929 F.3d 1057, 1062 (9th Cir. 2019) (en banc) ("By all accounts, and as even the government conceded, Briones had been a model inmate.").

4 567 U.S. 460, 489 (2012).

5 *See id*. at 479.

6 *Id.* ("[W]e think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon."); *Id*. at 479–80 (commenting that it is "the rare juvenile offender whose crime reflects irreparable corruption") (internal quotation marks omitted).

7 *See id*.

8 United States v. Briones, 890 F.3d 811, 814 (9th Cir. 2018) ("On the basis of *Miller*, Briones filed a motion under 28 U.S.C. § 2255 to vacate his original mandatory life sentence, which the district court granted in July, 2014.").

When he was nearly forty years old, Briones was granted a new sentencing hearing, at which the judge would determine whether Briones's crimes were the product of "transient immaturity" or whether they were evidence of "permanent incorrigibility."[9] The resentencing judge acknowledged that Briones had in fact changed since committing his crimes but nevertheless resentenced Briones to LWOP.[10]

Briones appealed, arguing that the resentencing decision failed to adequately take account of the evidence that he had the capacity for change, especially the evidence that he had in fact changed.[11] A panel of the U.S. Court of Appeals for the Ninth Circuit affirmed the sentencing decision,[12] but the en banc court reversed[13]—only to have its decision vacated by the U.S. Supreme Court.[14] On remand, the Ninth Circuit affirmed the district court's decision to resentence Briones to LWOP.[15]

This article explores the key issue in the *Briones* case and the thousands of cases[16] like it: the issue of "corrigibility" or capacity for change. This issue is at the heart of the recent "trilogy"[17] of Supreme Court cases addressing the Eighth Amendment limits on the sentencing

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[9] United States v. Briones, 18 F.4th 1170, 1173 (9th Cir. 2021).

[10] *See id*. at 1174.

[11] *Briones*, 890 F.3d at 817.

[12] *Id. at* 811.

[13] United States v. Briones, 929 F.3d 1057, 1057 (9th Cir. 2019) (en banc).

[14] United States v. Briones, 141 S. Ct. 2589, 2589 (2021).

[15] *See Briones*, 18 F.4th at 1174.

[16] The Court estimated that 2,000 offenders were in the same position as Briones, sentenced to mandatory LWOP for a crime committed as a juvenile. *See* 567 U.S. 460, 493-94 (2012) (Roberts, C.J., dissenting) ("The parties agree that nearly 2,500 prisoners are presently serving life sentences without the possibility of parole for murders they committed before the age of 18. The Court accepts that over 2,000 of those prisoners received that sentence because it was mandated by a legislature.") (citations omitted). After *Miller*, there will be no more mandatory LWOP sentences for juveniles, but corrigibility will continue to be important for discretionary sentencing.

[17] "The trilogy" became a common way for scholars to refer to the first three of the Supreme Court's cases involving juvenile sentencing and the Eighth Amendment, which were decided in fairly quick succession: Roper v. Simmons, 543 U.S. 551 (2005); Graham v. Florida, 560 U.S. 48 (2010); and *Miller*, 567 U.S. 460. *See, e.g.*, Perry L. Moriearty, *The Trilogy and Beyond*, 62 S.D. L. REV. 539, 539 (2017); Cara H. Drinan, *The* Miller *Revolution*, 101 IOWA L. REV. 1787, 1789 (2016); Tiffani N. Darden, *Constitutionally Different: A Child's Right to Substantive Due Process*, 50 LOY. U. CHI. L.J. 211, 219 (2018). Some more recent sources have omitted *Roper* and included Montgomery v. Louisiana, 577 U.S. 190 (2016). *See, e.g.*, Alexandra Harrington, *The Constitutionalization of Parole: Fulfilling the Promise of Meaningful Review,* 106 CORNELL L. REV. 1173, 1199 (2021); Mugambi Jouet, *Mass Incarceration Paradigm Shift?: Convergence in an Age of Divergence*, 109 J. CRIM. L. & CRIMINOLOGY 703, 708 (2019).

of juvenile offenders.[18] Although the Court's most recent case on this issue, which rolled back some of the protections established in previous cases, is likely to be its last for the foreseeable future,[19] the Court's prior decisions transformed the sentencing of juveniles—excluding juveniles from the death penalty,[20] from LWOP sentences for nonhomicide offenses,[21] and from mandatory LWOP sentences for any offense.[22]

Despite these advances, the Court's decisions in these cases took a wrong turn on the issue of corrigibility by assuming that some juveniles are incapable of change.[23] The root of the problem can be found in a single sentence in the first of the Court's "trilogy" of recent Eighth Amendment juvenile sentencing cases,[24] *Roper v. Simmons*, in which the Court proclaimed: "It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption."[25] In support of this statement implying that some juveniles are incapable of change, the Court provided a single citation, to a popular psychology journal article, which nowhere uses the phrase "irreparable corruption" or anything like it—the article does refer to juveniles who fail to reform, but it does not suggest that any juveniles are incapable of reform.[26] The Supreme Court thus created the category of "irreparably corrupt" juveniles essentially out of thin air.[27] The Court's supposition that these juvenile are "rare" does not make the assumption that they exist any less unfounded.

This article argues that the Supreme Court's creation of a category of "irreparably corrupt" juveniles was not only an epistemological mistake but also a tactical mistake, which has undermined the Court's express desire that only in the "rarest"[28] of cases will juveniles be

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[18] *See supra* note 17 and accompanying text. The trilogy is now more accurately labelled a quintet, including *Roper*, *Graham*, *Miller*, *Montgomery*, and *Jones*.
[19] *See infra* Part I.F.
[20] *Roper*, 543 U.S. at 558.
[21] *Graham*, 560 U.S. at 82.
[22] *See Miller*, 567 U.S. at 489.
[23] *See infra* Part I.D.
[24] *See supra* note 17 and accompanying text.
[25] *Roper*, 543 U.S. at 573.
[26] Laurence Steinberg & Elizabeth Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCH. 1009, 1014 (2003).
[27] The mistake of reasoning that because some juveniles do not reform, some juveniles are incapable of reform, is examined in detail in Part I.D, *infra*.
[28] Montgomery v. Louisiana, 577 U.S. 190, 209 (2016) ("*Miller* did bar life without parole, however, for all but the rarest of juvenile offenders, those whose crimes reflect

sentenced to life in prison without the possibility of parole.[29] Although in the cases addressing the death penalty and LWOP for nonhomicide offenses, the Court ruled that all juveniles must be excluded from a likely unconstitutional punishment, in *Miller v. Alabama* the Court ruled that juvenile offenders may be sentenced to LWOP for homicide offenses, so long as the sentence is not mandatory.[30] Discretionary LWOP sentences are supposed to be reserved for those juvenile offenders who are "irreparably corrupt,"[31] but the Court failed to impose any procedural requirements for sentencing judges and juries to follow when determining whether a particular juvenile offender is "irreparably corrupt."[32] Consequently, juvenile offenders remain subject to LWOP sentences for homicide offenses, with no means of ensuring that sentencing judges and juries will reserve that sentence for only the rarest of juveniles, those who are "permanently incorrigible."[33]

Although the Supreme Court failed to adopt a categorical exclusion from LWOP sentences for juveniles who commit homicide offenses, or even to impose enforceable limits on sentencing judges and juries, some state courts have used the Supreme Court's juvenile sentencing cases to extend greater sentencing protections to juveniles under state laws, based on juveniles' capacity for change.[34] The Supreme Court's identification of capacity for change as a basis for treating juvenile offenders differently from adult offenders has thus provided state courts with an important tool for resisting the harsh punishment of juvenile offenders. Additionally, some state courts have followed the Supreme Court in using scientific evidence—particularly neuroscientific studies—to expand sentencing protections for juveniles.[35] State legislatures, too, have used the reasoning of the Supreme Court's cases to

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permanent incorrigibility.").

[29] *See infra* Part II.A.

[30] Miller v. Alabama, 567 U.S. 460, 480 (2012) ("Although we do not foreclose a sentencer's ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.").

[31] *Id*. at 479-80.

[32] The only so-called requirement imposed by *Miller* is that sentencers "take into account" the relevant characteristics of juveniles. *See id*. at 480.

[33] This criticism is partly directed at sentencers, some of whom do not appear to be following in good faith the Court's directive to reserve the sentence of LWOP for the rare, "permanently incorrigible" juvenile. But the Court deserves much of the blame, first for supposing that "permanently incorrigible" juveniles exist and second for supposing that sentencers could (never mind would) identify them. *See infra* Part II.A.

[34] *See infra* Part III.A.

[35] *See infra* Part III.B.

enact statutory reforms based on the understanding that juveniles are especially capable of change.[36]

This article begins in Part I with a discussion of the Supreme Court's recent cases concerning the sentencing of juvenile offenders, crediting the Court's recognition that corrigibility is important to sentencing but also criticizing the Court's assumption that some juveniles are "permanently incorrigible." Part II discusses current issues related to corrigibility, including the consequences of regarding corrigibility as a sentencing factor as well as questions about "de facto LWOP" sentences and "stacked" sentences. Part III examines some of the effects of the Supreme Court's juvenile sentencing cases, particularly the use of brain science to inform thinking about criminal punishments. The article concludes that the Supreme Court's identification of capacity for change as an essential, constitutionally relevant factor in the administration of criminal punishment is an important insight that holds promise for even further reforms by state courts and legislatures.

I. THE RISE AND FALL OF CORRIGIBILITY IN THE UNITED STATES SUPREME COURT

A. The Prelude: *Atkins v. Virginia*, wherein the Court Categorically Excludes the Intellectually Disabled from the Death Penalty

Atkins v. Virginia did not involve juveniles or the issue of corrigibility, but it is nevertheless the starting point for the Supreme Court's juvenile corrigibility cases because it established the framework that the Court would use to decide that certain characteristics of juveniles—including capacity for change—make them less culpable for their crimes and therefore less deserving of certain criminal punishments.[37]

In *Atkins*, the Court considered whether the death penalty is a cruel and unusual punishment for people who are intellectually disabled.[38]

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[36] *See infra* Part III.A.

[37] *See* Roper v. Simmons, 543 U.S. 551, 564 (2005) ("Just as the *Atkins* Court reconsidered the issue decided in *Penry*, we now reconsider the issue decided in *Stanford*.").

[38] Although in *Atkins v. Virginia*, 536 U.S. 304 (2002), the Supreme Court used the term "mentally retarded," the Court has since acknowledged that the term "intellectually disabled" is now preferred:

> Previous opinions of this Court have employed the term "mental retardation." This opinion uses the term "intellectual disability" to describe the identical phenomenon. This change in terminology is approved and used in the latest

The Supreme Court's Eighth Amendment cases have established a two-part test for determining whether a particular punishment is "cruel and unusual."[39] First, the Court considers whether a "national consensus" exists against the punishment.[40] Second, the Court considers whether, in its own "independent evaluation," the punishment is cruel and unusual.[41] The first consideration is essentially an exercise in jurisdiction-counting—determining how many jurisdictions allow the punishment. The fewer the jurisdictions, the more unusual the punishment.[42] This article focuses on the second consideration, because it explains the Court's reasons for concluding that a particular punishment is cruel and

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> edition of the Diagnostic and Statistical Manual of Mental Disorders, one of the basic texts used by psychiatrists and other experts; the manual is often referred to by its initials "DSM," followed by its edition number, *e.g.*, "DSM–5." See American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 33 (5th ed. 2013).

Hall v. Florida, 572 U.S. 701, 704–05 (2014) (citations omitted).

[39] *Atkins*, 536 U.S. at 313 ("Guided by our approach in these [Eighth Amendment] cases, we shall first review the judgment of legislatures that have addressed the suitability of imposing the death penalty on the mentally retarded and then consider reasons for agreeing or disagreeing with their judgment.").

[40] *Id.* at 316 (concluding that the execution of people with mental retardation "has become truly unusual, and it is fair to say that a national consensus has developed against it").

[41] *Id.* at 321 ("Our independent evaluation of the issue reveals no reason to disagree with the judgment of the legislatures that have recently addressed the matter and concluded that death is not a suitable punishment for a mentally retarded criminal.") (internal quotation marks omitted).

[42] Which is not to say that this determination is necessarily straightforward—all of the Eighth Amendment cases examined in this article involved disputes about how to make this determination. *See, e.g.*, *id.* at 342 (Scalia, J., dissenting) (criticizing that the Court "miraculously extracts a 'national consensus' forbidding execution of the mentally retarded, *ante*, at 12, from the fact that 18 States—less than *half* (47%) of the 38 States that permit capital punishment (for whom the issue exists)—have very recently enacted legislation barring execution of the mentally retarded"); *Roper*, 543 U.S. at 609 (2005) (Scalia, J., dissenting) ("Words have no meaning if the views of less than 50% of death penalty States can constitute a national consensus."); Graham v. Florida, 560 U.S. 48, 107 (2010) (Thomas, J., dissenting) ("No plausible claim of a consensus against this sentencing practice can be made in light of this overwhelming legislative evidence. The sole fact that federal law authorizes this practice singlehandedly refutes the claim that our Nation finds it morally repugnant. The additional reality that 37 out of 50 States (a supermajority of 74%) permit the practice makes the claim utterly implausible."); Miller v. Alabama, 567 U.S. 460, 494 (2012) (Roberts, C.J., dissenting) ("[T]angible evidence of societal standards enables us to determine whether there is a consensus against a given sentencing practice. If there is, the punishment may be regarded as 'unusual.' But when, as here, most States formally require and frequently impose the punishment in question, there is no objective basis for that conclusion.") (citation and internal quotation marks omitted).

unusual. Regarding the question whether the death penalty is cruel and unusual punishment, the Court in *Atkins* concluded that the psychological deficits that define "intellectual disability" mean that an offender who is intellectually disabled cannot be among the most culpable offenders.[43] And because the death penalty must be reserved for the "worst of the worst,"[44] offenders who are intellectually disabled must be categorically excluded from this punishment.[45]

B. The First Act: *Roper v. Simmons*, wherein the Court Categorically Excludes Juveniles from the Death Penalty

The same reasoning that persuaded the Court that the death penalty is a cruel and unusual punishment for people who are intellectually disabled also persuaded the Court that the death penalty is a cruel and unusual punishment for juvenile offenders.[46] Juveniles, like people who are intellectually disabled, have certain psychological traits that diminish their culpability.[47] Specifically, the Court discussed three characteristics of juveniles that make them, as a group, less likely to have committed a crime with the same degree of culpability as an adult.[48] First,

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[43] The Court explained:

> Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. . . . Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.

Atkins, 536 U.S. at 318.

[44] Scholars have used the phrase "worst of the worst" to summarize the Supreme Court's decisions restricting the death penalty to the most culpable offenders and offenses. *See, e.g.*, Ursula Bentele, *Multiple Defendant Cases: When the Death Penalty is Imposed on the Less Culpable Offender*, 38 RUTGERS L. REC. 119, 120 (2011) ("As interpreted by the Supreme Court, the Eighth Amendment reserves the ultimate penalty for 'the worst of the worst,' those within the category of capital defendants for whom death constitutes a 'reasoned moral response' to the gravity of the crime and the character and background of the defendant.").

[45] *Atkins*, 536 U.S. at 319 ("If the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution.").

[46] *Roper*, 543 U.S. at 568. The Court used the term "juvenile offender" to refer to those under eighteen years old. *See, e.g.*, *id.* at 569 ("Three general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders.").

[47] *Id.* at 569.

[48] *Id.*

juveniles are impaired decision-makers, prone to "impetuous and ill-considered actions and decisions" and to "reckless behavior."[49] Second, juveniles are more vulnerable to external influences such as peer pressure.[50] And finally, juveniles are still sorting out their identities, such that their actions do not necessarily reflect their characters.[51]

In explaining how these particular traits of juveniles make them less culpable for their crimes, the Court introduced the concept of "corrigibility," although it did not use that particular word.[52] Instead, the Court said of juveniles: that "even a heinous crime" cannot be understood as "evidence of irretrievably depraved character"[53]; that "a greater possibility exists that a minor's character deficiencies will be reformed"[54]; and that "the signature qualities of youth are transient."[55] In essence, the Court reasoned that juveniles are less morally culpable for their crimes in part because they are corrigible—they are not irretrievably depraved but instead are capable of reform because their behaviors are influenced by transient, age-dependent characteristics such as impulsiveness and vulnerability to peer pressure.[56]

None of the Court's descriptions of the characteristics of juveniles are controversial. As Justice O'Connor observed in her dissenting opinion: "It is beyond cavil that juveniles as a class are generally less mature, less responsible, and less fully formed than adults, and that these differences bear on juveniles' comparative moral culpability."[57] But as Justice O'Connor also noted, the Court's discussion was limited to group tendencies, identifying traits that, unlike the diagnostic criteria for

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[49] *Id.*
[50] *Id.*
[51] *Id.* at 570.
[52] *See infra* notes 56-58 and accompanying text.
[53] *Roper*, 543 U.S. at 570.
[54] *Id.*
[55] *Id.*
[56] In subsequent cases, the Court stated more specifically its view that the "transiently depraved" juvenile has the capacity to reform, while the "irretrievably depraved" juvenile does not. *See, e.g.*, Montgomery v. Louisiana, 577 U.S. 190, 208 (2016) ("The Court [in *Miller*] recognized that a sentencer might encounter the rare juvenile offender who exhibits such irretrievable depravity that rehabilitation is impossible and life without parole is justified.").
[57] *Roper*, 543 U.S. at 599 (O'Connor, J., dissenting).

intellectual disability,[58] are not necessarily possessed by all juveniles.[59] The Court was willing to accept this criticism, acknowledging that some juveniles are as mature as some adults.[60] Indeed, the Court did not say that all juveniles are less mature, or less responsible, or less fully formed than adults. And this is undoubtedly the correct position with respect to these broad traits. But with respect to the particular trait that would become critical in subsequent cases—capacity for change—the Court should have been more careful about assuming that some juveniles are "irretrievably depraved."[61]

The Court seems to have derived its assumption that some juveniles are "irretrievably depraved" from evidence that most but not all juveniles "age out" of their delinquent behaviors. In support of its statement that "it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character," the Court quoted an article by psychologist Laurence Steinberg and law professor Elizabeth Scott: "For most teens, [risky or antisocial] behaviors are fleeting; they cease with maturity as individual identity becomes settled. Only a relatively small proportion of adolescents who experiment in risky or illegal activities develop entrenched patterns of problem behavior that persist into adulthood."[62] This quotation, however, describes actual change, not capacity for change. And just because some juveniles do not reform does not mean that they were incapable of reform. It is hard to imagine that the Court did not understand that its cited evidence proves only that some juvenile offenders continue to engage in antisocial behaviors as adults; it does not support an assumption that some juveniles are incapable of change. "[E]ntrenched patterns of problem

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[58] *Id.* at 602 ("Mentally retarded offenders, as we understood that category in *Atkins*, are defined by precisely the characteristics which render death an excessive punishment. A mentally retarded person is, by definition, one whose cognitive and behavioral capacities have been proved to fall below a certain minimum.") (internal quotation marks omitted).

[59] *Id.* ("Seventeen-year-olds may, on average, be less mature than adults, but that lesser maturity simply cannot be equated with the major, lifelong impairments suffered by the mentally retarded.").

[60] *Id.* at 574 ("The qualities that distinguish juveniles from adults do not disappear when an individual turns 18. By the same token, some under 18 have already attained a level of maturity some adults will never reach.").

[61] In none of its cases does the Court offer a straightforward definition of "irretrievably depraved," or "irreparably corrupt," or "permanently incorrigible." From context, especially in later cases, it is fairly clear that what the Court means by these phrases is a lack of capacity for change. *See, e.g.*, Graham v. Florida, 560 U.S. 48, 77 (2010) (contrasting "the few incorrigible juvenile offenders" with "the many that have the capacity for change").

[62] *Roper*, 543 U.S. at 570 (alteration in original).

behavior" (the words of Steinberg and Scott[63]) is not "evidence of irretrievably depraved character" (the Supreme Court's words[64]). By inferring that some juvenile offenders are incapable of change from evidence that some juvenile offenders will not change, the Court created an entire constitutionally meaningful category of people—juveniles who are "irretrievably depraved"—on the basis of essentially no evidence at all.[65]

While the Court's assumption that some juveniles are "irretrievably depraved" would have serious consequences in future cases,[66] the Court avoided these consequences in *Roper* by deciding that even if some juveniles are "irretrievably depraved" (and thus sufficiently culpable to deserve a death sentence), sentencing judges and juries cannot reliably distinguish those juveniles for whom death sentences would be cruel and unusual from those juveniles for whom death sentences would not be.[67] The Court therefore adopted a categorical rule prohibiting the death penalty for juvenile offenders.[68]

The Court offered two particular justifications in support of its categorical rule. First, the Court declared that sentencing judges and juries might give undue weight to the brutality of a murder and insufficient weight to the mitigating effects of youth: "An unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less

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[63] *Id*.

[64] *Id*. at 553 ("The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character.").

[65] *See id.* at 599 (O'Connor, J., dissenting) ("[T]he Court adduces no evidence whatsoever in support of its sweeping conclusion, see *ante*, at 1196–1197, that it is only in 'rare' cases, if ever, that 17–year–old murderers are sufficiently mature and act with sufficient depravity to warrant the death penalty."). Justice O'Connor's point was that such juveniles might be more common, but the opposite is also true: such juveniles might not exist at all. Justice O'Connor was nevertheless correct that the Court offered "no evidence whatsoever" in support of its assertion.

[66] *See infra* Part I.D.2.

[67] *Roper*, 543 U.S. at 572–73 ("The differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability.").

[68] *Id.* at 573–74 ("When a juvenile offender commits a heinous crime, the State can exact forfeiture of some of the most basic liberties, but the State cannot extinguish his life and his potential to attain a mature understanding of his own humanity.").

severe than death."[69] This observation is likely within the realm of judicial expertise, as it concerns the likely thought processes of jurors.[70]

In offering its second justification, however, the Court ventured into the realm of professional psychologists and made several mistakes. First, the Court stated: "It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption."[71] But no psychologist, however expert, is qualified to diagnose "irreparable corruption." Based on the Court's citation (again) to the article by Steinberg and Scott,[72] what the Court should have stated is that not even expert psychologists can predict which juvenile offenders will reform and which will not.[73]

The Court followed this misuse of the Steinberg and Scott article with the misuse of the professional standard of psychiatrists, as reflected in the Diagnostic and Statistical Manual of the American Psychiatric Association, that prohibits diagnosing people who are not yet eighteen years old with antisocial personality disorder.[74] The Court implied that this limitation is founded on a practical problem of identifying people who

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[69] *Id.* at 573.

[70] The Court's intuition was sound, as cases after *Miller* demonstrate. *See infra* Part II.A.

[71] *Roper*, 543 U.S. at 573.

[72] *Id*.

[73] The proposition that psychologists can accurately predict dangerousness (in anyone, adult or juvenile) is widely rejected. *See* David L. Faigman & Kelsey Geiser, *Using Burdens of Proof to Allocate the Risk of Error When Assessing Developmental Maturity of Youthful Offenders*, 63 WM. & MARY L. REV. 1289, 1303 (2022) ("Predictions of an adult's future dangerousness, let alone a juvenile's, are unreliable, inaccurate, and pose a particular concern with regard to racial bias."); Mary Marshall, Note, Miller v. Alabama *and the Problem of Prediction,* 119 COLUM. L. REV. 1633, 1657 (2019) ("All the limitations of predicting future dangerousness in adults become more pronounced when making predictions about whether a juvenile is capable of rehabilitation. There is substantial evidence to suggest that such predictions are impossible."); Elizabeth Scott, Thomas Grisso, Marsha Levick & Laurence Steinberg, *Juvenile Sentencing Reform in a Constitutional Framework*, 88 TEMP. L. REV. 675, 684 (2016) ("[P]rediction of future violence from adolescent criminal behavior, even serious criminal behavior, is unreliable and prone to error."); Michael Tonry, *Predictions of Dangerousness in Sentencing: Deja Vu All Over Again*, 48 CRIME & JUST. 439, 451 (2019) (describing meta-analyses that "conclude that positive predictions of future violence are too inaccurate to be used in sentencing").

[74] "As we understand it, this difficulty underlies the rule forbidding psychiatrists from diagnosing any patient under 18 as having antisocial personality disorder, a disorder also referred to as psychopathy or sociopathy, and which is characterized by callousness, cynicism, and contempt for the feelings, rights, and suffering of others." *Roper*, 543 U.S. at 573 (citing AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 701–706 (4th ed. text rev. ed. 2000).

are sufficiently mature to be diagnosed with antisocial personality disorder: "If trained psychiatrists with the advantage of clinical testing and observation refrain, despite diagnostic expertise, from assessing any juvenile under 18 as having antisocial personality disorder . . . ."[75] But this limitation is not based on practical issues of testing, observation, or diagnostic expertise. Instead, psychiatrists refrain from diagnosing adolescents with antisocial personality disorder for several more substantive reasons. First, some psychiatrists question whether a person who is younger than eighteen has a personality that is stable enough to be labeled as disordered.[76] Second, some psychologists believe that labeling an adolescent as "personality disordered" risks an unacceptable degree of stigma and discrimination.[77] Additionally, it is worth noting that a diagnosis of antisocial personality disorder means only that a person's behavior satisfies the DSM's diagnostic criteria;[78] it is not an assessment

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[75] *Id.*

[76] *See* Elizabeth Cauffman et. al., *Comparing the Stability of Psychopathy Scores in Adolescents Versus Adults: How Often Is "Fledgling Psychopathy" Misdiagnosed?*, 22 PSYCHOL., PUB. POL'Y, & L. 77, 77 (2016) ("There is considerable debate about whether psychopathy can be identified during adolescence . . . a developmental period that includes profound changes in personality and identify formation.") (citations omitted); Gwen Adshead et al., *Personality Disorder in Adolescence*, 18 ADVANCES PSYCHIATRIC TREATMENT 109, 116 (2012) (noting "the continuing reluctance of clinicians to diagnose personality disorder in young people whose personalities are still developing"); Andrea Fossati & Antonella Somma, *The Assessment of Personality Pathology in Adolescence From the Perspective of the Alternative DSM-5 Model for Personality Disorder*, 37 CURRENT OPINION PSYCH. 39, 39 (2021) ("[P]ersonality in adolescence is considered still developing and therefore too unstable to warrant a PD diagnosis.").

[77] *See* Elizabeth Emens, *The Sympathetic Discriminator: Mental Illness, Hedonic Costs, and the ADA*, 94 GEO. L.J. 399, 401 (2006); STEPHEN P. HINSHAW, THE MARK OF SHAME: STIGMA OF MENTAL ILLNESS AND AN AGENDA FOR CHANGE 28-52, 93-114 (2007).

[78] The diagnostic criteria for antisocial personality disorder are:

A. A pervasive pattern of disregard for and violation of the rights of others, occurring since age 15 years, as indicated by 3 (or more) of the following:
   - Failure to conform to social norms with respect to lawful behaviors, as indicated by repeatedly performing acts that are grounds for arrest
   - Deceitfulness, as indicated by repeated lying, use of aliases, or conning others for personal profit or pleasure
   - Impulsivity or failure to plan ahead
   - Irritability and aggressiveness, as indicated by repeated physical fights or assaults
   - Reckless disregard for safety of self or others
   - Consistent irresponsibility, as indicated by repeated failure to sustain consistent work behavior or honor financial obligations
   - Lack of remorse, as indicated by being indifferent to or rationalizing having hurt, mistreated, or stolen from another

B. The individual is at least age 18 years

that the person is "irreparably corrupt."[79] Even in adults, personality disorders (including antisocial personality disorder) are not always stable over time.[80] Moreover, the primary purpose of all psychiatric diagnoses is to provide treatment.[81] And although treatments for antisocial personality disorder are not always effective, no psychiatrist would say that anyone, whether adolescent or adult, whose antisocial personality traits persisted despite treatment was "irreparably corrupt."[82] In short, "irreparable

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C. There is evidence of conduct disorder with onset before age 15 years

D. The occurrence of antisocial behavior is not exclusively during the course of schizophrenia or bipolar disorder.

AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 659 (5th ed. 2013).

[79] Psychiatric diagnoses are tautologies—a particular disorder is nothing more than a set of behavioral criteria that defines the disorder: "As a matter of definition, Antisocial Personality Disorder is essentially a tautological diagnosis defined by reference to patterns of misconduct that, in turn, comprise the diagnosis." Robert Kinscherff, *Proposition: A Personality Disorder May Nullify Responsibility for a Criminal Act*, 38 J.L., MED. & ETHICS 745, 755 (2010). Which is not to say that psychiatric diagnoses are not useful for treatment or research (their purpose); on the other hand, they should not be thought of as anything more than particular collections of behavioral criteria that psychiatrists have found useful for treatment and research. The DSM itself specifically cautions against the legal system's use of these diagnoses: "When the DSM-IV categories, criteria, and textual descriptions are employed for forensic purposes, there is a risk that diagnostic information will be misused or misunderstood. These dangers arise because of the imperfect fit between the questions of ultimate concern to the law and the information contained in a clinical diagnosis." AM. PSYCHIATRIC ASS'N, *supra* note 78, at 25.

[80] *See* Kathleen Wayland & Sean D. O'Brien, *Deconstructing Antisocial Personality Disorder and Psychopathy: A Guidelines-Based Approach to Prejudicial Psychiatric Labels*, 42 HOFSTRA L. REV. 519, 588 n.110 (2013) ("[S]ince personality disorders are defined as pervasive and unremitting (i.e., as fixed), it would be expected that ASPD diagnoses of individuals would remain constant over time. However, that assumption has been challenged.") (citation omitted); Cauffman et al., *supra* note 76, at 79 ("Even in adulthood, traits exhibit some degree of change."); Mark R. Fondacaro, *Rethinking the Scientific and Legal Implications of Developmental Differences Research in Juvenile Justice*, 17 NEW CRIM. L. REV. 407, 419 (2014) (noting "empirical research indicating that the majority of adults with Antisocial Personality Disorder improve over time").

[81] AM. PSYCHIATRIC ASS'N, *supra* note 78.

[82] *Cf.* Jennifer L. Skeem & Devon L. L. Polaschek, *High Risk, Not Hopeless: Correctional Intervention for People at Risk for Violence*, 103 MARQ. L. REV. 1129, 1148 (2020) ("[P]eople at risk for violence—including those with psychopathic traits—are not so different from other offenders as to warrant the presumption that they need to be identified and quarantined because we have no methods for promoting positive change or keeping their dangerous behavior in check."); Thomas Grisso & Antoinette Kavanaugh, *Prospects for Developmental Evidence in Juvenile Sentencing Based on* Miller v. Alabama, 22 PSYCH., PUB. POL'Y, & L. 235, 240 (2016) ("There is no evidence that youths with psychopathic features are incapable of benefitting from treatment or that

corruption" is a label invented by the Supreme Court, a label that is only imperfectly analogous to a diagnosis of antisocial personality disorder.

C. The Second Act: *Graham v. Florida*, wherein the Court Categorically Excludes Juveniles from Life without Parole for Nonhomicide Offenses

The Court again focused on the culpability of juvenile offenders in *Graham v. Florida*, ruling that a sentence of life in prison without the possibility of parole is a cruel and unusual punishment for someone who has committed a nonhomicide offense as a juvenile.[83] In *Graham*, the Court's views about juveniles' capacity for change took center stage.[84] A sentence of LWOP is most appropriate for incapacitating offenders who are believed incapable of ever reforming.[85] The Court explained that LWOP sentences are incompatible with rehabilitation:

> Life in prison without the possibility of parole gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope. Maturity can lead to that considered reflection which is the foundation for remorse, renewal, and rehabilitation. A young person who knows that he or she has no chance to leave prison before life's end has little incentive to become a responsible individual.[86]

Juvenile offenders, however, are particularly capable of reforming: "To justify life without parole on the assumption that the juvenile offender forever will be a danger to society requires the sentencer to make a judgment that the juvenile is incorrigible. The characteristics of juveniles make that judgment questionable."[87]

Despite the implication that such a judgment is possible—"questionable" is not the same as "impossible"—the Court decided that a categorical rule was necessary to ensure that corrigible juveniles were not

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treatment is contraindicated.") (citation omitted).

[83] Graham v. Florida, 560 U.S. 48, 77 (2010) (justifying a categorical rule in part because of doubt that "courts taking a case-by-case proportionality approach could with sufficient accuracy distinguish the few incorrigible juvenile offenders from the many that have the capacity for change").

[84] *See, e.g.*, *id*. at 68 ("Juveniles are more capable of change than are adults, and their actions are less likely to be evidence of 'irretrievably depraved character' than are the actions of adults."); *id*. at 74 ("By denying the defendant the right to reenter the community, the State makes an irrevocable judgment about that person's value and place in society. This judgment is not appropriate in light of a juvenile nonhomicide offender's capacity for change and limited moral culpability.").

[85] *Id.* at 79.

[86] *Id.*

[87] *Id*. at 72-73.

sentenced to LWOP.[88] In explaining why a case-by-case approach would be insufficient, the Court articulated ambivalent views about the corrigibility of juveniles, implying but not expressly asserting that some juveniles are incapable of change.[89] For example, the Court stated that allowing judges to make case-by-case determinations of corrigibility would involve too great a risk of mistakenly identifying juveniles as incorrigible when they are not.[90] Specifically, the Court reasoned: "[E]ven if we were to assume that some juvenile nonhomicide offenders might have 'sufficient psychological maturity, and at the same time demonstrate sufficient depravity' to merit a life without parole sentence, it does not follow that courts taking a case-by-case proportionality approach could with sufficient accuracy distinguish the few incorrigible juvenile offenders from the many that have the capacity for change."[91] This explanation wavers on the question whether some juveniles are incorrigible, using the hypothetical "even if" construction.[92] Similarly, the Court stated: "[A] categorical rule gives all juvenile nonhomicide offenders a chance to demonstrate maturity and reform."[93] This statement could be read as expressing the view that all juveniles are capable of change, but it could also be read as expressing the view that judges and juries cannot, at the time of sentencing, identify those juveniles who are incapable of change.

As in *Roper*, the Court's adoption of a categorical prohibition avoided any direct consequences from the Court's willingness to accept that some juveniles might be "irretrievably depraved." However, the Court's failure to assert that all juveniles are capable of change, at least so far as can be determined by both expert psychiatrists and sentencing judges or juries, created a fault line that would soon undermine the protections that it was creating for juvenile offenders.

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[88] *Id*. at 75-79.
[89] *Id*.
[90] *Id*. at 77-78.
[91] *Id.* at 77 (quoting Roper v. Simmons, 543 U.S. 551, 572 (2005)).
[92] The Court's explanation also confuses capacity to change with (present) maturity and depravity. But these are different things; a juvenile might be mature and depraved (which the Court suggested would warrant an LWOP sentence) yet still have the capacity to change. *See id.*
[93] *Id*. at 79.

D. The Third Act: *Miller v. Alabama*, wherein the Court Fails to Categorically Exclude Juveniles from Life without Parole for Any Offense

The Court's equivocation in *Graham*—all juveniles should have the chance to demonstrate capacity for reform, but perhaps some juveniles are "irretrievably depraved"— became consequential in the case *Miller v. Alabama*.[94] In *Graham*, the Court had been willing to err on the side of protecting all juveniles. Even if the Court believed that some juveniles are "irretrievably depraved," the Court nevertheless adopted a categorical rule excluding all juveniles from LWOP for nonhomicide offenses based on the difficulty of sorting the "irretrievably depraved" from the "transiently immature."[95] In *Miller*, however, the Court rejected a categorical rule excluding all juveniles from LWOP for homicide offenses.[96] Instead, the Court ruled only that mandatory LWOP sentences are prohibited by the Eighth Amendment because mandatory sentences do not allow judges to take account of the mitigating effects of youth.[97] *Miller* thus repeated the mistake of the previous cases—allowing for the possibility that some juveniles are "irretrievably depraved"—but then added an additional mistake—assuming that sentencing judges and juries can identify which juveniles are "irretrievably depraved" and which are

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[94] Miller v. Alabama, 567 U.S. 460, 479-80 (2012).

[95] *Graham*, 560 U.S. at 77 (expressing doubt "that courts taking a case-by-case proportionality approach could with sufficient accuracy distinguish the few incorrigible juvenile offenders from the many that have the capacity for change").

[96] *Miller*, 567 U.S. at 479–80. The Court referred to "the great difficulty we noted in *Roper* and *Graham* of distinguishing at this early age between 'the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.'" *Id*. (quoting *Roper*, 543 U.S. at 573; *Graham*, 560 U.S. at 68). Yet in the very next sentence the Court concluded: "Although we do not foreclose a sentencer's ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id*. Nowhere did the Court's opinion explain how or why sentencers can make this distinction in homicide cases but not in nonhomicide cases. Indeed, the explanation offered in *Graham*—that sentencers will give undue weight to the brutality of a crime—would seem to apply with even greater force in homicide cases. *Cf. Graham* 560 U.S. at 78 ("[A]n 'unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death.'") (quoting Roper v. Simmons, 543 U.S. 551, 573 (2005).

[97] *Miller*, 567 U.S. at 489 ("*Graham*, *Roper*, and our individualized sentencing decisions make clear that a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles.").

"transiently immature."[98]

1. The First Mistake: Accepting that Some Juveniles Are "Irretrievably Depraved"

The Court laid the groundwork for accepting that some juveniles are "irretrievably depraved" in *Roper*, although because it was a death penalty case the Court's analysis was focused on explaining why a juvenile offender could not be the "worst of the worst"[99] rather than explaining why a sentence of life in prison with no hope of release was a disproportionate sentence.[100] Even though capacity for change was not central to the Court's analysis in *Roper*, the Court did include it as one of the three "broad differences" between juveniles and adults.[101] Thus in *Roper*, capacity for change was one of an assortment of characteristics of juveniles that the Court offered in support of its conclusion that juveniles cannot be among the most culpable offenders.[102] And although the Court continued to offer these assorted characteristics in subsequent cases, one particular characteristic—capacity for change—became the most important as the Court moved from the punishment of death to the punishment of LWOP, because this characteristic is most directly relevant to the punishment of life in prison without the possibility of parole.[103] The possibility of parole only matters if an offender is capable of reform.[104]

In *Graham*, the Court followed *Roper* in concluding that "even if" some juvenile offenders are incapable of change, judges and juries could not reliably identify them at the time of sentencing. However, in *Miller* the Court declined to follow *Roper* and *Graham* in adopting a categorical exclusion, and the question whether some juveniles are incapable of change became critically important. Although the Court stated that it

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[98] The Court doesn't even attempt to explain why.

[99] *See supra* note 44.

[100] *Roper*, 543 U.S. at 570 ("These differences render suspect any conclusion that a juvenile falls among the worst offenders.").

[101] *Id.* ("The third broad difference is that the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed.").

[102] *Id*.

[103] *See* Alice Ristroph, *Hope, Imprisonment, and the Constitution*, 23 FED. SENT'G. REP. 75, 76 (2010) ("Hope, or its denial, distinguishes LWOP from other prison sentences—not irrevocability, and not any necessary difference in the actual length of incarceration.").

[104] Terrell Carter, Rachel López & Kempis Songster, *Redeeming Justice*, 116 NW. U. L. REV. 315, 346 (2021) ("By design, LWOP sentences are not meant to facilitate rehabilitation. The U.S. Supreme Court said as much, concluding in *Graham* and reiterating in *Miller* that an LWOP sentence 'forswears altogether the rehabilitative ideal.'").

believed such cases to be "rare"[105] or "uncommon,"[106] the Court used language suggesting that it believed that some juvenile offenders are in fact incapable of change.[107] For example, the *Miller* Court omitted the "even if" language that it had used in *Graham* to refer to "irretrievably depraved" juveniles.

As in *Roper* and *Graham*, the *Miller* Court's assumption that incorrigible juveniles do exist but are "rare" again seemed to rest entirely on the observation that most but not all juvenile offenders will "age out" of their criminal behavior, as described in the oft-cited Steinberg and Scott article.[108] But of course a failure to change does not prove an incapacity for change. Certainly, some juvenile offenders will continue to engage in antisocial behaviors, including committing crimes, once they become adults.[109] But their continued antisocial behaviors do not prove that they were incapable of change; it *could* mean that they were incapable of change but it could also mean that they did not receive the kinds of support that would have enabled them to change.[110]

This failure to reform despite correctional efforts seems to have been the original meaning of the word "incorrigible" as applied to juveniles. Historically, "incorrigible" juveniles seem to have been those who continued to engage in prohibited behaviors despite efforts at rehabilitating them. The problem was viewed not as the manifestation of an intrinsic or permanent trait of the juvenile but rather as the contingent

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[105] *Miller*, 567 U.S. at 479-80 (referring to "the rare juvenile offender whose crime reflects irreparable corruption").

[106] *Id*. at 479 ("[W]e think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon.").

[107] *See id*. at 479.

[108] In *Miller*, the Court repeated its quotation from *Roper*: "In *Roper*, we cited studies showing that '[o]nly a relatively small proportion of adolescents' who engage in illegal activity 'develop entrenched patterns of problem behavior.'" 567 U.S. at 471 (quoting Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCH. 1009, 1014 (2003)).

[109] *See id.* at 479.

[110] *Cf.* Skeem & Polaschek, *supra* note 82, at 1142–43 ("The selective attrition of people who most need services is often cast as a problem of 'treatment-resistant clients' but may also be viewed as a problem of 'client-resistant services.' . . . [C]haracteristics that contribute to high risk peoples' offending (e.g., hostility, noncompliance, negative attitudes, disruptive behavior, learning problems)—and therefore need to change—can also make them difficult clients. Given these characteristics, it is understandable that clinicians, probation officers, and other professionals generally prefer to avoid high-risk cases—spending their time instead with cooperative, motivated, low risk cases, who have little need for their services.").

consequence of inadequate rehabilitative programs.[111] "Incorrigibility" was seen as a mismatch between a juvenile's needs and the support he had received; it was not seen as a fixed aspect of a juvenile's character.[112]

Modern legislatures have largely eliminated this "archaic"[113] word from their statutes relating to juveniles. For example, the current guide to New York Family Court Practice notes that the legislature has removed the term "incorrigible" from the Family Court Act and explains: "The archaic provision, dating from the 19th century, defies a coherent definition in the contemporary world. Parents may still exclaim to a recalcitrant child 'You are incorrigible,' whatever that may mean, but the youngster can no longer be petitioned into the Family Court."[114]

A few states retain "incorrigible," although the behaviors that qualify a juvenile as "incorrigible" are nowhere near the kinds of crimes at issue in death penalty or LWOP cases. For example, the current Arizona statute governing juvenile court defines an "incorrigible child" in terms of behaviors including being "habitually truant from school" and being "a runaway from the child's home or parent, guardian or custodian."[115] This statute considers an "incorrigible child" a step below a "delinquent child."[116]

The idea of a "permanently incorrigible" juvenile seems not to have existed as a legal construct until the Court's opinion in *Roper*.[117] The

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[111] *See Facts and Law of Inter-Institutional Transfer of Juveniles*, 20 ME. L. REV. 93, 107-08 (1968).

[112] *See* 14 AM. JUR. TRIALS 619 § 10, Westlaw (database updated Feb. 2023) (originally published in 1968) ("'Incorrigible' means unmanageable by parents or guardians. By statutory definition, an incorrigible may be a delinquent. Incorrigible minors are sometimes designated as persons in need of supervision. They may also be termed 'pre-delinquent juveniles.' They generally include those persons below a certain statutory age, usually ranging from eight to twenty-one years, who habitually refuse to obey the reasonable and proper orders of their parents, guardians, custodians, or school authorities; they include those who are beyond the control of such persons, or who are habitual truants from school, or who from any cause are in danger of leading an idle, dissolute, lewd, or immoral life.") (footnotes omitted).

[113] 10 N.Y. Prac., New York Family Court Practice § 11:2 (2d ed.).

[114] *Id.*

[115] ARIZ. REV. STAT. ANN. § 8-201 (2022).

[116] *Id.*

[117] The author searched the Westlaw "all federal cases" and "all state cases" databases using the search term: (permanent! +2 incorrigib!). The only pre-*Roper* case to include the phrase "permanently incorrigible" is a 1958 opinion from the Supreme Court of Oklahoma:

> Society requires children, as well as adults, to conform to the laws of the city, state and federal government. Yet experience tells us that in many instances children, by reason of inexperience, age and/or lack of training, fail to

Supreme Court's opinion in *Roper* also seems to be the origin of the phrases "irreparable corruption"[118] and "irretrievably depraved,"[119] which (so far as can be determined from Westlaw[120]) do not appear in an opinion of any state or federal court prior to *Roper*.[121] Perhaps these phrases were appropriate in *Roper* given the context of the death penalty—variations on the phrase "the worst of the worst."[122] But the Court repeated these phrases in subsequent cases[123] as if it were a matter of common knowledge or general acceptance that some juveniles are irretrievably depraved or irreparably corrupt.

> understand the consequences of their acts and their responsibility as members of a community. Thus it has been found with proper direction those children, who might become a permanent incorrigible or confirmed criminal, can be fitted into the community as law abiding, responsible citizens.

Anderson v. Walker, 333 P.2d 570, 578 (Okla. 1958) (Corn, J., dissenting).

The only other similar reference in a United States Supreme Court case is found in Justice Stevens's dissenting opinion in the 1991 case Harmelin v. Michigan, which used the phrase "wholly incorrigible":

> [A] mandatory sentence of life imprisonment without the possibility of parole does share one important characteristic of a death sentence: The offender will never regain his freedom. Because such a sentence does not even purport to serve a rehabilitative function, the sentence must rest on a rational determination that the punished criminal conduct is so atrocious that society's interest in deterrence and retribution wholly outweighs any considerations of reform or rehabilitation of the perpetrator. Serious as this defendant's crime was, I believe it is irrational to conclude that every similar offender is wholly incorrigible."

501 U.S. 957, 1028 (1991) (citation and internal quotation marks omitted).

[118] Roper v. Simmons, 543 U.S. 551, 573 (2005) ("It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.").

[119] *Id.* at 553 ("The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character.").

[120] The author searched the Westlaw "all federal cases" and "all state cases" databases using the search terms: (irrepar! +2 corrupt!) or (irretriev! +2 deprav!).

[121] At least so far as applies to people. United States v. Lamantia, 59 F.3d 705, 708 (7th Cir. 1995) ("Proclaiming that Girardi's misconduct had 'irreparably corrupted' the indictment process, the district court held that in this case the structural protections of the grand jury had been compromised beyond repair."); United States v. Lamantia, 856 F. Supp. 424, 426 (N.D. Ill. 1994), rev'd, 59 F.3d 705 (7th Cir. 1995) ("[The grand jury's] indictment of the defendants is irreparably corrupted, and cannot stand.").

[122] *See supra* note 44.

[123] *See e.g.*, Graham v. Florida, 560 U.S. 48, 68 (2010) ("Juveniles are more capable of change than are adults, and their actions are less likely to be evidence of 'irretrievably depraved character' than are the actions of adults.").

2. The Second Mistake: Accepting that Sentencers Can Identify Juveniles Who Are "Irretrievably Depraved"

The second *Miller* mistake, implicit in the decision to prohibit mandatory LWOP sentences for juveniles while allowing individualized LWOP sentences, is accepting that judges and juries are capable of determining which juvenile offenders are "irreparably corrupt" and which are "transiently immature."[124] Even assuming that "irreparably corrupt" juveniles exist, there is no reason to think that any way exists to identify them—as *Roper* and *Graham* recognized.[125] The *Miller* Court acknowledged "the great difficulty we noted in *Roper* and *Graham* of distinguishing at this early age between 'the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.'"[126] Yet immediately following this acknowledgement, without offering any explanation, the Court proclaimed: "Although we do not foreclose a sentencer's ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison."[127]

The *Miller* Court's willingness to allow judges and juries to make this determination raises the question whether the categorical exclusions adopted in *Roper* and *Graham* were necessary.[128] If it is not too risky to allow an individualized sentence for a juvenile convicted of a noncapital homicide offense, why is it too risky to allow an individualized sentence for a juvenile convicted of capital murder or a nonhomicide offense? At least one of the three decisions would seem to be wrong; either sentencing judges and juries are capable of "distinguishing at this early age between 'the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects

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[124] Miller v. Alabama, 567 U.S. 460, 479–80 (2012).
[125] Roper v. Simmons, 543 U.S. 551, 573 (2005); *Graham*, 560 U.S. at 68.
[126] *Miller*, 567 U.S. at 479–80 (quoting *Roper*, 543 U.S. at 573; *Graham*, 560 U.S. at 68).
[127] *Id*.
[128] Dissents argued that sentencing judges and juries are capable of making this determination. *See, e.g.*, *Roper*, 543 U.S. at 603 (O'Connor., J., dissenting) ("The Court argues that sentencing juries cannot accurately evaluate a youthful offender's maturity or give appropriate weight to the mitigating characteristics related to youth. But, again, the Court presents no real evidence—and the record appears to contain none—supporting this claim."); *Graham*, 560 U.S. at 119 (2010) (Thomas, J., dissenting) (criticizing the Court for its "decree that the people of this country are not fit to decide for themselves when the rare case requires different treatment").

irreparable corruption,'"[129] or they are not.[130]

It is perplexing why the *Miller* Court chose to allow some juveniles to be sentenced to LWOP, so long as the sentence is not mandatory and "take[s] into account how children are different," rather than to rely on the reasoning that justified the categorical rules in *Roper* and *Graham*.[131] The Court offered no principled explanation,[132] and no

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[129] *Miller*, 567 U.S. at 479–80 (quoting *Roper*, 543 U.S. at 573; *Graham*, 560 U.S. at 68).

[130] All the science supports the conclusion that this is not a determination that anyone—psychiatrist, judge, juror—can make. *See* Brief for the Am. Psych. Ass'n et al. as Amicus Curiae Supporting Petitioners p. 25, Miller v. Alabama, 567 U.S. 460 (2012) (Nos. 10-9646, 10-9647) ("[T]here is no reliable way to determine that a juvenile's offenses are the result of an irredeemably corrupt character . . ."); Marshall, *supra* note 73, at 1635 ("*Miller* emphasizes a unique, indeed impossible, prediction about how a juvenile will develop over time.") (footnotes omitted); Parag Dharmavarapu, *Categorically Redeeming* Graham v Florida *and* Miller v Alabama: *Why the Eighth Amendment Guarantees All Juvenile Defendants a Constitutional Right to a Parole Hearing*, 86 U. CHI. L. REV. 1439, 1462 (2019) (concluding that "a definitive ex ante determination of irredeemability is categorically impossible"); Grisso & Kavanaugh, *supra* note 82, at 240 ("[T]here is no evidence that measures of psychopathic traits during adolescence can estimate the likelihood that they constitute enduring and unchangeable traits when applied to individual cases.") (citations omitted); Daniel O'Connell et. al., *Violent Offending, Desistance, and Recidivism*, 103 MARQ. L. REV. 983, 1003 (2020) ("Research on violent offending tells us what people *did*, and from that research, inferences can be made about what people *may* do or are more *likely* to do, but it will not tell us what they *will* do. . . . The criminological literature is rife with failed attempts to develop tools to predict who will or will not offend after release based on known individual risk factors.").

[131] The Court simply stated:

> We therefore hold that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders. . . . Because that holding is sufficient to decide these cases, we do not consider Jackson's and Miller's alternative argument that the Eighth Amendment requires a categorical bar on life without parole for juveniles, or at least for those 14 and younger.

Miller, 567 U.S. at 479.

[132] The Court's opinion might be read as suggesting that the need for individualized sentences rested on death penalty precedents that require individualized sentences. Specifically, the Court explained its decision in *Miller* as resting on two sets of precedents: those concerning juveniles (*Roper* and *Graham*) and those concerning the death penalty:

> The cases before us implicate two strands of precedent reflecting our concern with proportionate punishment. The first has adopted categorical bans on sentencing practices based on mismatches between the culpability of a class of offenders and the severity of a penalty. . . . Several of the cases in this group have specially focused on juvenile offenders, because of their lesser culpability. Thus, *Roper* held that the Eighth Amendment bars capital punishment for children, and *Graham* concluded that the Amendment also prohibits a sentence of life without the possibility of parole for a child who committed a nonhomicide offense. *Graham* further likened life without parole for juveniles

practical explanation is apparent. Such a choice might be understandable as the result of a compromise among the justices, a narrower rule that was necessary to convince one or more of the justices to join the Court's opinion. Indeed, the decision in *Miller* was 5-4, and so perhaps one or more of the five justices in the majority preferred the narrower rule. If that was the case, though, it is not obvious which of the five—Justices Kennedy, Ginsburg, Breyer, Sotomayor, or Kagan—might have resisted the broader categorical rule, given that all who were members of the Court at the time joined the Court's decisions in both *Roper*[133] and *Graham*.[134] Chief Justice Roberts, who had concurred in *Graham*, wrote a separate dissent in *Miller*, so if the narrower opinion was intended to persuade him then it was obviously a failure (and thus unnecessary).[135] Justices Scalia, Thomas, and Alito all dissented in *Miller*,[136] and none of the three were likely to join the Court's majority in *Miller* no matter how narrow the ruling.[137]

> to the death penalty itself, thereby evoking a second line of our precedents. In those cases, we have prohibited mandatory imposition of capital punishment, requiring that sentencing authorities consider the characteristics of a defendant and the details of his offense before sentencing him to death. *See Woodson v. North Carolina*, 428 U.S. 280 (1976) (plurality opinion); *Lockett v. Ohio*, 438 U.S. 586 (1978). Here, the confluence of these two lines of precedent leads to the conclusion that mandatory life-without-parole sentences for juveniles violate the Eighth Amendment.

Id. at 470.

However, precedents such as *Woodson* and *Lockett* only suggest that individualized sentences are one means of addressing the concerns that the Court articulated in those cases (that an insufficiently culpable offender would be sentenced to death). These precedents do not compel that anyone be sentenced to death; they only require following certain procedures for whatever death sentences are imposed.

[133] The justices joining the Court's majority opinion were Kennedy, Stevens, Souter, Ginsburg, and Breyer.

[134] The justices joining the majority were Kennedy, Stevens, Ginsburg, Breyer, and Sotomayor. If the decision in *Miller* was the result of a compromise, Justice Kagan seems likely to be the justice responsible, both as the only justice in the *Miller* majority not to have previously joined a decision adopting a categorical rule (perhaps because she was not yet a member of the Court but also perhaps because she would not have supported such as rule) and as the author of the opinion in *Miller*.

[135] *See* Graham v. Florida, 560 U.S. 48, 86 (2010) (Roberts, C.J., concurring); *Miller*, 567 U.S. at 293 (Roberts, C.J., dissenting).

[136] Justices Thomas and Alito joined Chief Justice Roberts in writing separate dissenting opinions, and Justice Scalia joined all three. All also dissented in *Graham*, and Thomas and Scalia dissented in *Atkins*. (No doubt Alito would also have dissented but he had not yet joined the Court.)

[137] The Court recognized the ideological divide in these cases:

> The three dissenting opinions here each take issue with some or all of those precedents. That is not surprising: Their authors (and joiner) each dissented

E. The Fourth Act: *Montgomery v. Louisiana*, wherein the Court Downplays the Procedural Component of *Miller*

In *Roper* and *Graham*, the Supreme Court decided to err on the side of protecting juveniles from unconstitutional sentences, adopting categorical exclusions from the death penalty and life without parole for nonhomicide offenses even though the Court allowed for the possibility that such sentences might not be unconstitutional for all juveniles. In *Miller*, the Court inexplicably decided to risk unconstitutional sentences, declining to categorically exclude juveniles from LWOP sentences for any offense. The decision in *Miller* created uncertainty about the constitutionality of not only future LWOP sentences but also the LWOP sentences of juveniles who had been sentenced prior to *Miller*. The Supreme Court considered the question of *Miller*'s applicability to prior LWOP sentences in *Montgomery v. Louisiana*.

In *Montgomery*, the Supreme Court faced a state court that wanted to limit *Miller* to future cases, meaning that people who had been sentenced to mandatory LWOP for homicides they committed as juveniles were not now, after *Miller*, entitled to either a lesser sentence than LWOP or a discretionary LWOP sentence imposed only after taking into account the possibility that they were not "irreparably corrupt."[138] The Supreme Court developed a test for determining whether its decisions apply only prospectively or also apply retroactively in the 1989 case *Teague v. Lane*;[139] in relevant part, this test provides that decisions creating new procedural rules apply only prospectively while decisions creating new substantive rules of constitutional law also apply retroactively.[140] Thus, to conclude that the rule announced in *Miller*

> from some or all of those precedents. In particular, each disagreed with the majority's reasoning in *Graham*, which is the foundation stone of our analysis. See *Graham*, 560 U.S. at 68 (Roberts, C.J., concurring in judgment); *id.* at 97 (Thomas, J., joined by Scalia and Alito, JJ., dissenting); *id.* at 124 (Alito, J., dissenting). While the dissents seek to relitigate old Eighth Amendment battles, repeating many arguments this Court has previously (and often) rejected, we apply the logic of *Roper*, *Graham*, and our individualized sentencing decisions to these two cases.

Miller, 567 U.S. at 470 n.4 (citations omitted).

[138] *See* Montgomery v. Louisiana, 577 U.S. 190, 198 (2016) (discussing Teague v. Lane, 489 U.S. 288 (1989)).

[139] *Teague*, 489 U.S. at 306-310.

[140] "Watershed" rules of procedure also apply retroactively, but no one in *Montgomery* was arguing that *Miller* created such a rule, so this article sets aside that complexity. Either the rule announced in *Miller* was procedural and applied only prospectively or it was substantive and applied retroactively. For an in-depth complete discussion of the retroactivity issue, see Peter Bozzo, *What We Talk About When We Talk About*

applied to people whose sentences had become final prior to that decision, the Court in *Montgomery* needed to find that the rule announced in *Miller* was a new substantive constitutional rule.[141]

The problem for the Court in *Montgomery* was that the most obvious thing that the new rule announced in *Miller* had done was prohibit a particular procedure: the mandatory imposition of an LWOP sentence.[142] The Court thus could not say that the rule announced in *Miller* was wholly substantive but instead acknowledged that *Miller* had a "procedural component."[143] But the Court explained that this procedural component was secondary to the primary, substantive rule prohibiting the imposition of an LWOP sentence if the juvenile offender is "transiently immature" rather than "irreparably depraved."[144] The Court identified *Miller*'s substantive rule as defining the line between permissible discretionary LWOP sentences and impermissible discretionary LWOP sentences.[145] Although emphasizing *Miller's* "line-drawing" might have solved the problem in *Montgomery* of how to make *Miller* retroactive, it also had the effect of solidifying the Court's position that there are two kinds of juvenile offenders: those that are "transiently immature" and those that are "irreparably corrupt."[146]

Additionally, the *Montgomery* Court's emphasis of *Miller*'s substantive component highlighted a loophole that states like Louisiana could use to avoid the implications of *Miller*: simply provide "[a] hearing where 'youth and its attendant characteristics' are considered as

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Retroactivity, 46 AM. J. CRIM. L. 13 (2019).

[141] *See Montgomery*, 577 U.S. at 195.

[142] *See id.* ("*Miller* held that mandatory life without parole for juvenile homicide offenders violates the Eighth Amendment's prohibition on cruel and unusual punishments.") (internal quotation marks omitted).

[143] *Id*. at 209-10 ("To be sure, *Miller*'s holding has a procedural component. *Miller* requires a sentencer to consider a juvenile offender's youth and attendant characteristics before determining that life without parole is a proportionate sentence.").

[144] *Id.* at 210 ("A hearing where 'youth and its attendant characteristics' are considered as sentencing factors is necessary to separate those juveniles who may be sentenced to life without parole from those who may not. The hearing does not replace but rather gives effect to *Miller*'s substantive holding that life without parole is an excessive sentence for children whose crimes reflect transient immaturity.") (citation omitted).

[145] *Id.* at 209 ("*Miller* drew a line between children whose crimes reflect transient immaturity and those rare children whose crimes reflect irreparable corruption.").

[146] *Id.* at 210 (referring to "*Miller*'s substantive holding that life without parole is an excessive sentence for children whose crimes reflect transient immaturity"); *id*. at 211 ("That *Miller* did not impose a formal factfinding requirement does not leave States free to sentence a child whose crime reflects transient immaturity to life without parole.").

sentencing factors."[147] Given the protracted resistance of some states to the substantive requirement of *Atkins*—for example, Texas invented its own test for determining intellectual disability, a test that was unmoored from any medical or psychological definitions[148]—it is difficult to believe that the *Montgomery* Court expected that all states would, in the absence of clearly and explicitly required procedures for ensuring adherence to *Miller*'s substantive requirements, endeavor in good faith to create their own.[149]

The Court stated that federalism concerns cautioned against mandating specific procedures,[150] but the Court also seemed to believe that states would simply choose the easy and obvious means of complying with *Miller*: eliminating LWOP for all juvenile offenders.[151] Despite the Court's apparent confidence that mandating specific procedures was unnecessary because states could comply with *Miller* by adopting one non-burdensome[152] rule, some states were determined to preserve LWOP for juvenile offenders despite the added effort and expense of individualized resentencing.[153] This determination led to the next and seemingly final chapter in the current corrigibility story, at least in the federal courts.

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[147] *Id.* at 210.

[148] *See* Moore v. Texas, 581 U.S. 1, 17 (2017) ("By design and in operation, the *Briseno* factors create an unacceptable risk that persons with intellectual disability will be executed.") (alteration and internal quotation marks omitted).

[149] As two noted death penalty scholars observed regarding *Atkins*: "[B]y essentially deregulating the procedural means of enforcing the substantive right, the Court has undermined the goals of the underlying ban by creating a substantial risk of false negatives." Carol S. Steiker & Jordan M. Steiker, Atkins v. Virginia: *Lessons from Substance and Procedure in the Constitutional Regulation of Capital Punishment*, 57 DEPAUL L. REV. 721, 725 (2008).

[150] *Montgomery*, 577 U.S. at 211 ("When a new substantive rule of constitutional law is established, this Court is careful to limit the scope of any attendant procedural requirement to avoid intruding more than necessary upon the States' sovereign administration of their criminal justice systems.").

[151] *Id.* at 212 ("A State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them.").

[152] *Id.* ("Extending parole eligibility to juvenile offenders does not impose an onerous burden on the States . . . .").

[153] Some states did "fix" the problem created by *Miller* by resentencing all mandatory LWOP juvenile offenders to some other sentence, such as life with the possibility of parole. *See, e.g.*, State v. Scott, 416 P.3d 1182, 1183 (2018) ("This case addresses the adequacy of the parole remedy available under RCW 9.94A.730, the *Miller* 'fix' statute. . . . [W]e hold that RCW 9.94A.730's parole provision is an adequate remedy for a *Miller* violation, rendering unnecessary the resentencing of a defendant who long ago received a de facto life sentence as a juvenile.").

F. The Final Act: *Jones v. Mississippi*, wherein the Court Confirms Corrigibility Is (Only) a Sentencing Factor

A preliminary note about *Jones v. Mississippi* is that the cast of justices has changed since the beginning of this story. In the fifteen years between *Atkins* and *Montgomery*, four new justices joined the Supreme Court; however, these changes did not substantially affect the Court's consideration of the relevant issues because the new justices' views aligned with the views of the justices they replaced: Justices Stevens and Souter joined the majority in *Atkins* and *Roper*,[154] and Justices Sotomayor and Kagan joined the majority in all subsequent cases;[155] Justices O'Connor and Rehnquist dissented in *Atkins* and *Roper*,[156] and Justice Alito dissented in all subsequent cases.[157] The only exception is Chief Justice Roberts, who concurred in *Graham*,[158] dissented in *Miller*,[159] and then joined the majority in *Montgomery*.[160] But between *Montgomery* and *Jones*, three additional justices left the Court: Justices Kennedy and Ginsburg, who had joined the majority in every case from *Atkins* to *Montgomery*,[161] and Justice Scalia, who had dissented in every case.[162] All three of the newest justices—Gorsuch, Kavanaugh, and Barrett—joined the previously dissenting justices—Thomas and Alito—plus Chief Justice Roberts to form a majority in *Jones*.[163]

The question in *Jones* was whether *Miller* and *Montgomery* require that a discretionary sentence of LWOP be supported by a finding that the juvenile offender is "permanently incorrigible."[164] After the Court in *Montgomery* decided that *Miller* applied retroactively, the LWOP

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[154] Atkins v. Virginia, 536 U.S. 304 (2002); Roper v. Simmons, 543 U.S. 551 (2005).
[155] Graham v. Florida, 560 U.S. 48 (2010); Miller v. Alabama, 567 U.S. 460 (2012); *Montgomery*, 577 U.S. 190.
[156] *Atkins*, 536 U.S. 304; *Roper*, 543 U.S. 551.
[157] *Graham*, 560 U.S. at 97 (Alito, J., dissenting); *Miller*, 567 U.S. at 493 (Scalia, J., dissenting); *Montgomery*, 577 U.S. at 213 (Alito, J., dissenting).
[158] *Graham*, 560 U.S. at 86 (2010) (Roberts, C.J., concurring).
[159] *Miller*, 567 U.S. at 493 (Roberts, C.J., dissenting).
[160] *Montgomery*, 577 U.S. 190.
[161] *Atkins*, 536 U.S. 304; *Roper*, 543 U.S. at 554; *Graham*, 560 U.S. at 51; *Miller*, 567 U.S. 460; *Montgomery*, 577 U.S. 190.
[162] *Atkins*, 536 U.S. at 321 (Scalia, J., dissenting); *Roper*, 543 U.S. at 607 (Scalia, J., dissenting); *Graham*, 560 U.S. at 97 (2010) (Scalia, J., dissenting); *Miller*, 567 U.S. at 470 (Scalia, J., dissenting); *Montgomery*, 577 U.S. at 213 (Scalia, J., dissenting).
[163] Jones v. Mississippi, 141 S. Ct. 1307 (2021).
[164] *Id.* at 1311 ("Jones contends that a sentencer who imposes a life-without-parole sentence must *also* make a separate factual finding that the defendant is permanently incorrigible, or at least provide an on-the-record sentencing explanation with an implicit finding that the defendant is permanently incorrigible.").

sentences of more than 2,000 people became unconstitutional because the judges in those cases had not had the option to determine that LWOP was a disproportionate sentence.[165] Although some states had followed the Court's suggestion in *Montgomery* to simply make all juvenile offenders eligible for parole,[166] other states opted to provide juvenile offenders who had been sentenced to mandatory LWOP with an individualized resentencing, at which the judge would decide whether to reimpose the LWOP sentence or to impose a less severe sentence. The case of Riley Briones is one example of such a case;[167] the case of Brett Jones is another.[168]

Jones was 15 years old when he killed his grandfather.[169] A jury found Jones guilty of murder, an offense punishable by a mandatory sentence of LWOP.[170] After *Miller* made that sentence unconstitutional, Jones was granted a resentencing hearing.[171] After he was resentenced to LWOP, Jones argued on appeal that *Miller* implicitly requires judges to find a juvenile offender "permanently incorrigible" before imposing a sentence of LWOP.[172] Many state and federal courts had agreed with this argument.[173] The Supreme Court, however, disagreed, reasoning that *Miller* and *Montgomery* mandated only that a juvenile offender be afforded an individualized sentencing process that allows the judge to

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[165] *See Miller*, 567 U.S. at 493-94 (Roberts, C.J., dissenting) ("The parties agree that nearly 2,500 prisoners are presently serving life sentences without the possibility of parole for murders they committed before the age of 18. The Court accepts that over 2,000 of those prisoners received that sentence because it was mandated by a legislature.") (citations omitted).

[166] In some states, legislatures provided for the exclusion of juvenile offenders from LWOP sentences. In other states, courts decided that state constitutions required this result. *See, e.g.*, State v. Anderson, 516 P.3d 1213, 1220 (Wash. 2022) (en banc) ("To eliminate the unacceptable risk that children undeserving of a life without parole sentence will receive one, we announced a categorical bar under article I, section 14 prohibiting the imposition of LWOP sentences on all juvenile offenders.") (citation and internal quotation marks omitted).

[167] *See supra* notes 1-15 and accompanying text.

[168] *Jones*, 141 S. Ct. 1307.

[169] *Id.* at 1312.

[170] *Id.*

[171] *Id.*

[172] *Id.* at 1311 ("Jones contends that a sentencer who imposes a life-without-parole sentence must *also* make a separate factual finding that the defendant is permanently incorrigible, or at least provide an on-the-record sentencing explanation with an implicit finding that the defendant is permanently incorrigible.").

[173] *See, e.g.*, United States v. Briones, 929 F.3d 1057, 1064 (9th Cir. 2019) (en banc); Malvo v. Mathena, 893 F.3d 265, 274 (4th Cir. 2018), Commonwealth v. Batts, 163 A.3d 410, 451-52 (Pa. 2017); Veal v. State, 784 S.E.2d 403, 411-12 (Ga. 2016).

consider the mitigating characteristics of youth.[174] An individualized sentence is "both constitutionally necessary and constitutionally sufficient."[175]

Although the ideological shift in the makeup of the Supreme Court undoubtedly affected the decision in *Jones*, the issue in *Jones* would not have arisen if in its earlier decisions the Court had been more thoughtful about the existence of "irretrievably depraved" or "irreparably corrupt" juveniles. Corrigibility is logically central to making LWOP a cruel and unusual sentence for juveniles; capacity for change is what makes the denial of the opportunity for parole especially and disproportionately punitive.[176] But the Court failed to make it central. Instead, the Court equivocated—maybe some juveniles are incorrigible (but only rarely), and maybe sentencing judges can identify them (but only when they commit a noncapital homicide offense). Because the Court in *Miller* failed to assert that, so far as can be supported by our current scientific understanding, all juveniles are capable of change, the Court in *Jones* was able to reinforce what the Court in *Montgomery* had already stated: that corrigibility is a sentencing factor, nothing less but also nothing more.[177]

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[174] *Jones,* 141 S. Ct. at 1318 ("The key assumption of both *Miller* and *Montgomery* was that discretionary sentencing allows the sentencer to consider the defendant's youth, and thereby helps ensure that life-without-parole sentences are imposed only in cases where that sentence is appropriate in light of the defendant's age. If the *Miller* or *Montgomery* Court wanted to require sentencers to also make a factual finding of permanent incorrigibility, the Court easily could have said so—and surely would have said so.").

[175] *Id.* at 1313 ("In a case involving an individual who was under 18 when he or she committed a homicide, a State's discretionary sentencing system is both constitutionally necessary and constitutionally sufficient.").

[176] *See* Eva S. Nilsen, *Decency, Dignity, and Desert: Restoring Ideals of Humane Punishment to Constitutional Discourse*, 41 U.C. DAVIS L. REV. 111, 162 (2007) ("[T]he United States is one of only four industrialized countries that sentence juveniles to life imprisonment without parole. It is a uniquely cruel sentence that deprives children of both any hope for return to society and any opportunity for rehabilitation.") (footnote omitted).

[177] *Jones*, 141 S. Ct. at 1316 ("In short, *Miller* followed the Court's many death penalty cases and required that a sentencer consider youth as a mitigating factor when deciding whether to impose a life-without-parole sentence."); *id.* at 1319 ("It is true that one sentencer may weigh the defendant's youth differently than another sentencer or an appellate court would, given the mix of all the facts and circumstances in a specific case.").

II. CORRIGIBILITY AFTER *JONES V. MISSISSIPPI*

A. Corrigibility As a Sentencing Factor

Whether the Court's decision in *Jones* is faithful to the principle established in *Miller*, that LWOP is a cruel and unusual sentence for juveniles who are capable of change, is questionable. The dissenting opinion argued that *Jones* "gutted" *Miller* and *Montgomery*,[178] and decisions by state and federal courts applying *Jones* largely confirm this assessment: corrigibility has lost the special relevance the Court in *Miller* had attempted to give it.[179] After *Jones*, so long as the sentencer has the opportunity to consider the characteristics of youth in an individualized sentencing process, the sentence complies with *Miller*.[180] For example, in Riley Briones's case, the Ninth Circuit concluded that after *Jones*, it was sufficient that the resentencing judge had "plainly considered 'youth and its attendant characteristics'" before reimposing a sentence of LWOP, even though the judge did not explain how Briones could be "permanently

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[178] *Id.* at 1328.

[179] *See* United States v. Grant, 9 F.4th 186, 197 (3d Cir. 2021) ("[T]he Court has guaranteed to juvenile homicide offenders only a sentencing procedure in which the sentencer must weigh youth as a mitigating factor. The Court has *not* guaranteed particular outcomes for either corrigible or incorrigible juvenile homicide offenders."); Commonwealth v. Felder, 269 A.3d 1232, 1243 (Pa. 2022) (explaining that after *Jones* "we are constrained to conclude that without a substantive constitutional mooring, the procedural protections we adopted in *Batts II* cannot stand in their current, judicially-created form").

[180] Miller v. Alabama, 567 U.S. 460, 480 (2012) ("[W]e require [a sentencer] to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.").

That the dissenting opinion in *Jones* referred to *Montgomery* as establishing substantive guarantees highlights the key shortcoming of *Miller*: failing to categorically prohibit LWOP sentences for juvenile offenders. *See Jones*, 141 S. Ct. 1307 (2021). Technically, *Montgomery* did not (and could not) establish guarantees; it only held that the guarantees that *Miller* established were substantive and therefore retroactive. *Cf.* United States v. Briones, 18 F.4th 1170, 1173 (9th Cir. 2021) ("In dicta, *Montgomery* also appeared to *extend Miller*'s rule, suggesting that LWOP is 'an unconstitutional penalty for . . . juvenile offenders whose crimes reflect the transient immaturity of youth,' *i.e.*, 'for all but . . . those whose crimes reflect permanent incorrigibility.'") (quoting *Montgomery*, 577 U.S. at 208–09); *Montgomery*, 577 U.S. at 225 (Scalia, J., dissenting) ("[T]he majority is not applying *Miller*, but rewriting it.").

It is hard not to agree with Justice Scalia's dissenting opinion that the Court in *Montgomery* was rewriting *Miller*. On the other hand, it is also hard not to agree with Justice Sotomayor's dissenting opinion in *Jones* that the Court was rewriting *Montgomery*, which held that *Miller* established a new substantive rule. See *Jones*, 141 S. Ct. at 1334 (Sotomayor, J., dissenting) ("For *Montgomery* to make any sense, then, *Miller* must have done more than mandate a certain procedure.").

incorrigible" if he had in fact changed in the decades since committing his crimes.[181]

The *Jones* decision's disregard of *Miller*'s substantive principle means that juvenile offenders who have in fact changed since committing their crimes may still be sentenced to LWOP.[182] This is most dramatically true for offenders who were granted resentencing hearings after *Miller* and *Montgomery*, and who were resentenced to LWOP despite decades of evidence establishing their capacity for change.[183] It is also likely to remain true in future cases, given that sentencing may occur long after the commission of a crime.[184]

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[181] *Briones*, 18 F.4th at 1175 (quoting *Montgomery*, 577 U.S. at 210).

[182] Justice Scalia anticipated the problem that evidence might support a finding that a juvenile was "incorrigible" at the time of sentencing yet later evidence might suggest that he was not: "Under *Miller* . . . the inquiry is whether the inmate was seen to be incorrigible when he was sentenced—not whether he has proven corrigible and so can safely be paroled today." *Montgomery*, 577 U.S. at 226 (Scalia, J., dissenting).

[183] Montgomery himself is an example: "[D]espite his victory before the Supreme Court, Henry Montgomery himself was recently denied parole for the second time even though, at seventy-two, he has served fifty-five years and has an impeccable improvement in his correctional record." Cara H. Drinan, *Conversations on the Warren Court's Impact on Criminal Justice:* In Re Gault *at 50*, 49 STETSON L. REV. 433, 452 (2020).

[184] A related issue is whether sentencing judges can and should take account of post-offense or post-conviction evidence of a juvenile offender's capacity for change. The Court's opinion in *Miller* invited confusion on this issue by contrasting "transient immaturity" and "irreparable corruption." Some sentencing judges have decided that their task is to decide the immaturity or incorrigibility of the juvenile offender at the time of the offense. These judges conclude that post-arrest or post-conviction evidence of reform is irrelevant. In these cases, judges have resentenced juvenile offenders to LWOP despite evidence of actual change. *See, e.g.*, State v. McCleese, 215 A.3d 1154, 1171-73 (Conn. 2019).

These cases, however, appear to be in the minority, with most judges—at least with respect to resentencings after *Miller*—taking account of evidence of actual change. *See, e.g.*, State v. Haag, 495 P.3d 241, 247 (Wash. 2021) ("[I]n our state the resentencing courts *must* consider the measure of rehabilitation that has occurred since a youth was originally sentenced to life without parole. Such hearings must therefore be forward looking, focusing on rehabilitation rather than on the past.") (citations and internal quotation marks omitted); United States v. Pete, 819 F.3d 1121, 1133 (9th Cir. 2016) ("[T]he critical question under *Miller* was Pete's capacity to change after he committed the crimes at the age of 16. As to that consideration, whether Pete *has* changed in some fundamental way since that time, and in what respects, is surely key evidence."); People v. Arrieta, 2021 IL App (2d) 180037-U, ¶ 100 ("[U]nlike at the initial sentencing hearing, the trial court did not have to speculate at the new sentencing hearing as to how defendant might rehabilitate over his next 20-plus years in prison. It was able to hear evidence not just of defendant's *potential* for rehabilitation but evidence for and against his actual rehabilitation."); State v. Zuber, 152 A.3d 197, 216 (N.J. 2017) ("The sentencing judge should also 'view defendant as he stands before the court' at resentencing and consider

While corrigibility has no special importance after *Jones*, some sentencing judges do appear to be according particular weight to a different sentencing factor: the brutality of a juvenile offender's crime. In many cases, sentencing judges have acknowledged evidence of a juvenile offender's corrigibility but concluded that the severity of the crime warranted an LWOP sentence.[185] These cases confirm the Court's insight in *Roper* that the brutality of a crime can overshadow those characteristics of juvenile offenders that should exempt them from the harshest, most hopelessly punitive sentences possible.[186]

B. Additional Threads Left Unresolved

Although *Jones* resolved one uncertainty that had remained after *Miller*—whether an individualized sentencing procedure is sufficient, or whether more is required—several important corrigibility-related issues are still unresolved. One issue is whether a term of years sentence, such as a sentence that provides an opportunity for release only after serving 100 years in prison, can be a "de facto" LWOP sentence and is therefore subject to the same Eighth Amendment limitations as an actual LWOP sentence.[187] A related issue is what courts must do to provide juvenile offenders who are capable of change with a "meaningful opportunity for release."[188]

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any rehabilitative efforts since his original sentence.") (quoting State v. Randolph, 44 A.3d 1113, 1128 (N.J. 2012)).

[185] *See, e.g.*, United States v. Jefferson, 816 F.3d 1016, 1020 (8th Cir. 2016) (affirming resentencing to a de facto LWOP sentence even though the court "[d]eem[ed] Jefferson's rehabilitation an 'extraordinary success,'" because the court "properly gave significant weight to the extreme severity of Jefferson's crimes"); United States v. Orsinger, 698 F. App'x 527, 528 (9th Cir. 2017) (concluding that there was "no error in the district court's considering the heinousness of the crimes").

[186] Many scholars have noted the harshness of LWOP. *See*, *e.g.*, Craig S. Lerner, *Life Without Parole As A Conflicted Punishment*, 48 WAKE FOREST L. REV. 1101, 1103 (2013) ("What distinguishes the American criminal justice system and brands it as distinctively harsh by comparison with the civilized, and even uncivilized, world is the frequency with which it banishes its own citizens to cages for the duration of their lives and with no pretense of offering a legal mechanism for freedom.").

[187] Justice Alito's dissenting opinion in *Graham* anticipated this problem: "Nothing in the Court's opinion affects the imposition of a sentence to a term of years without the possibility of parole." Graham v. Florida, 560 U.S. 48, 124 (2010) (Alito, J., dissenting). The Court's opinion, however, does not address this problem.

[188] "Meaningful opportunity to obtain release" is from the Court's opinion in *Graham*. *Id.* at 123.

1. De Facto LWOP Sentences

The substantive principle of *Graham* and *Miller* is that sentencing a juvenile offender who is capable of change to "die in prison"[189] is a cruel and unusual punishment. A sentence of LWOP is prohibited for all except the "permanently incorrigible" because denying juvenile offenders the opportunity to demonstrate that they are not the same people they were when they committed their crimes is essentially a denial of their humanity.[190] But what about the juvenile offender who is sentenced to a term of imprisonment that is longer than his expected lifetime?[191] Is such a "de facto LWOP" sentence the same as an actual LWOP sentence for Eighth Amendment purposes?

This question is an easy one for some courts: there is no such thing as a de facto LWOP sentence.[192] For example, the Colorado Supreme Court stated: "Life without parole is a specific sentence, distinct from sentences to terms of years."[193] The U.S. Court of Appeals for the Fifth Circuit agreed: "[A] term-of-years sentence cannot be characterized as a *de facto* life sentence."[194]

Many courts, however, have decided that some term-of-years sentences are functionally the same as a sentence of LWOP.[195] For

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[189] The Court explained in *Graham*:

> Terrance Graham's sentence guarantees he will die in prison without any meaningful opportunity to obtain release, no matter what he might do to demonstrate that the bad acts he committed as a teenager are not representative of his true character, even if he spends the next half century attempting to atone for his crimes and learn from his mistakes. The State has denied him any chance to later demonstrate that he is fit to rejoin society based solely on a nonhomicide crime that he committed while he was a child in the eyes of the law. This the Eighth Amendment does not permit.

Id. at 79.

[190] *See id.* ("The juvenile should not be deprived of the opportunity to achieve maturity of judgment and self-recognition of human worth and potential.").

[191] Exceptionally long term-of-years sentences usually result from the aggregation of multiple sentences that run consecutively. The aggregation of sentences raises an additional issue that is discussed *infra* Part II.B.2.

[192] *See, e.g.*, State v. Kasic, 265 P.3d 410, 414-15 (Ariz. Ct. App. 2011) (holding *Graham* inapplicable to term-of-years sentences); Hobbs v. Turner, 431 S.W.3d 283, 289 (Ark. 2014) (holding *Graham* and *Miller* do not apply to a "nonlife sentence"); Lucero v. People, 394 P.3d 1128, 1130 (Colo. 2017) (refusing to recognize de facto LWOP sentences in part because "[l]ife without parole is a specific sentence"); Veal v. State, 810 S.E.2d 127, 129 (Ga. 2018) (refusing to apply *Miller* and *Montgomery* to any sentences "other than LWOP").

[193] *Lucero*, 394 P.3d at 1130.

[194] United States v. Sparks, 941 F.3d 748, 754 (5th Cir. 2019).

[195] *See, e.g.*, People v. Reyes, 63 N.E.3d 884, 888 (Ill. 2016) ("In this case, defendant

example, the California Supreme Court observed: "Importantly, *Graham* said '[a] young person who knows that he or she has no chance to leave prison before life's end has little incentive to become a responsible individual.' We believe the same is true here: A young person who knows he or she has no chance to leave prison for 50 years 'has little incentive to become a responsible individual.'"[196] Similarly, the Supreme Court of Ohio stated: "We see no significant difference between a sentence of life imprisonment without parole and a term-of-years prison sentence that would extend beyond the defendant's expected lifespan before the possibility of parole. The court in *Graham* was not barring a terminology—'life without parole'—but rather a punishment that removes a juvenile from society without a meaningful chance to demonstrate rehabilitation and obtain release."[197] These statements recognize the connection between corrigibility and the opportunity to

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committed offenses in a single course of conduct that subjected him to a legislatively mandated sentence of 97 years, with the earliest opportunity for release after 89 years. . . . [U]nder these circumstances, defendant's term-of-years sentence is a mandatory, *de facto* life-without-parole sentence."); State *ex rel.* Morgan v. State, 217 So.3d 266, 271 (La. 2016) ("We . . . construe the defendant's 99-year sentence as an effective life sentence, illegal under *Graham.*"); State v. Moore, 76 N.E.3d 1127, 1134 (Ohio 2016) ("The court did not address in *Graham* whether a term-of-years prison sentence that extends beyond an offender's life expectancy—a functional life sentence—falls under the *Graham* categorical bar. But we conclude that *Graham* does establish a categorical prohibition of such sentences."); State v. Pearson, 836 N.W.2d 88, 96 (Iowa 2013) ("Though *Miller* involved sentences of life without parole for juvenile homicide offenders, its reasoning applies equally to Pearson's sentence of thirty-five years without the possibility of parole for these offenses."); Casiano v. Comm'r of Corr., 115 A.3d 1031, 1044 (Conn. 2015) ("[T]he Supreme Court's focus in *Graham* and *Miller* was not on the label of a 'life sentence' but rather on whether a juvenile would, as a consequence of a lengthy sentence without the possibility of parole, actually be imprisoned for the rest of his life.") (internal quotation marks omitted); Henry v. State, 175 So.3d 675, 680 (Fla. 2015) ("[W]e believe that the *Graham* Court had no intention of limiting its new categorical rule to sentences denominated under the exclusive term of 'life in prison.'"); State v. Boston, 363 P.3d 453, 458 (Nev. 2015) ("[A] district court violates the prohibition of cruel and unusual punishment when it sentences a nonhomicide juvenile offender to the functional equivalent of life without the possibility of parole."); Carter v. State, 192 A.3d 695, 726 (Md. Ct. App. 2018) ("The *Graham* Court's reasoning regarding retribution is equally applicable to a lengthy term-of-years sentence as it is to one labeled as 'life.'"); Steilman v. Michael, 407 P.3d 313, 319 (Mont. 2017) ("Logically, the requirement to consider how 'children are different' cannot be limited to de jure life sentences when a lengthy sentence denominated in a number of years will effectively result in the juvenile offender's imprisonment for life."); State v. Zuber, 152 A.3d 197, 201 (N.J. 2017) ("The proper focus belongs on the amount of real time a juvenile will spend in jail and not on the formal label attached to his sentence.").

[196] People v. Contreras, 411 P.3d 445, 454 (Cal. 2018) (quoting *Graham*, 560 U.S. 48).

[197] *Moore*, 76 N.E.3d at 1139–40.

obtain release; the reason that LWOP is an especially severe sentence for a juvenile is because juveniles are especially capable of changing.

2. The Special Problem of "Stacked" Sentences

A particular subset of de facto LWOP cases highlights how judges can allow the brutality of a juvenile's crime to justify a sentence that offers no realistic hope of release, in the absence of evidence that the juvenile is "permanently incorrigible" or even despite evidence that the juvenile is not "permanently incorrigible." In these cases, a de facto LWOP sentence results from the "stacking" or aggregation of sentences for multiple offenses. Many courts have ruled that even if some term-of-years sentences for single crimes might be de facto LWOP sentences and therefore subject to *Graham* and *Miller*, aggregated sentences for multiple crimes are not.[198] The force driving these decisions is retribution—sentences that might otherwise be cruel and unusual under the reasoning of *Graham* or *Miller*, because they provide no opportunity for release, are

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[198] *See, e.g.*, Martinez v. State, 442 P.3d 154, 156 (Okla. Crim. App. 2019) ("[W]e hold that where multiple sentences have been imposed, each sentence should be analyzed separately to determine whether it comports with the Eighth Amendment under the *Graham*/*Miller*/*Montgomery* trilogy of cases, rather than considering the cumulative effect of all sentences imposed upon a given defendant."); *Lucero*, 394 P.3d at 1133 ("Multiple sentences imposed for multiple offenses do not become a sentence of life without parole, even though they may result in a lengthy term of incarceration. Life without parole is a specific sentence, imposed as punishment for a single crime, which remains distinct from aggregate term-of-years sentences resulting from multiple convictions."); State v. Ali, 895 N.W.2d 237, 246 (Minn. 2017) ("[A]bsent further guidance from the Court, we will not extend the *Miller*/*Montgomery* rule to include Mahdi and other similarly situated juvenile offenders who are being sentenced for multiple crimes . . . ."); Willbanks v. Dep't of Corr., 522 S.W.3d 238, 246 (Mo. 2017) ("The Supreme Court has never held that consecutive lengthy sentences for multiple crimes in excess of a juvenile's life expectancy is the functional equivalent of life without parole."); Vasquez v. Commonwealth, 71 S.E.2d 920, 931 (Va. 2016) ("Nothing in *Graham* dictates that multiple sentences involving multiple crimes be treated, for Eighth Amendment purposes, in exactly the same manner as a single life-without-parole sentence for a single crime."); United States v. Cobler, 748 F.3d 570, 580 n.4 (4th Cir. 2014) ("The Supreme Court has not yet decided the question whether a lengthy term-of-years sentence is, for constitutional purposes, the same as a sentence of life imprisonment without the possibility of parole.").

Some courts have taken the opposite view, that stacked or aggregate sentences are subject to the restraints established in *Graham* and *Miller*. *See, e.g.*, State v. Ramos, 387 P.3d 650, 660 (Wash. 2017) ("Whether that sentence is for a single crime or an aggregated sentence for multiple crimes, we cannot ignore that the practical result is the same."); *Moore*, 76 N.E.3d at 1141 ("We note at the outset that the defendant in *Graham* had committed multiple offenses").

deserved because the juvenile committed multiple offenses.[199] For example, the Oregon Supreme Court stated: "[T]he sentencing court's determination that petitioner should serve 40 months for each classmate whom he shot with the intent to kill reflects a legitimate interest in retribution that is proportionate to each attempted murder and results in a correspondingly proportionate aggregate sentence for all petitioner's crimes."[200] Similarly, Judge Hudson of the Oklahoma Court of Criminal Appeals stated: "I write separately to expand upon the Court's holding that when a juvenile offender is convicted of multiple offenses, each sentence imposed should be analyzed separately under the Eighth Amendment. To hold otherwise would effectively give crimes away."[201]

The *Miller* Court's decision not to mandate any procedures beyond individualized sentencing has left its substantive principle, that only "irretrievably depraved" juvenile offenders should be sentenced to LWOP, essentially unenforceable. If capacity for change is merely a mitigating factor, then it is entirely foreseeable that judges would decide that it can be outweighed by aggravating factors.[202] The Court should have anticipated that giving sentencing judges the discretion to impose a sentence less than LWOP would also give judges the discretion to impose

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[199] *See, e.g.*, *Ali*, 895 N.W.2d at 246; State v. Slocumb, 827 S.E.2d 148, 152 (S.C. 2019); *Martinez*, 442 P.3d at 156-57; *Vasquez*, 781 S.E.2d at 926.
[200] Kinkel v. Persson, 417 P.3d 401, 413 (Or. 2018).
[201] *Martinez*, 442 P.3d at 157 (Hudson, J., concurring). *Accord* Commonwealth v. Foust, 180 A.3d 416, 436 (Pa. Super. Ct. 2018) ("[T]here is nothing in *Roper*, *Graham*, and/or *Miller* that speaks to volume discounts for multiple crimes.").

Opinions expressing this view often cite an 1892 Supreme Court case distinguishing aggregate sentences from single sentences for purposes of assessing the constitutionality of the sentences:

> If he has subjected himself to a severe penalty, it is simply because he has committed a great many such offenses. It would scarcely be competent for a person to assail the constitutionality of the statute prescribing a punishment for burglary on the ground that he had committed so many burglaries that, if punishment for each were inflicted on him, he might be kept in prison for life. The mere fact that cumulative punishments may be imposed for distinct offenses in the same prosecution is not material upon this question. If the penalty were unreasonably severe for a single offense, the constitutional question might be urged; but here the unreasonableness is only in the number of offenses which the respondent has committed.

O'Neil v. State, 144 U.S. 323, 331 (Vt. 1892). For a collection of citing cases, see Martinez v. State, 442 P.3d 154, 157 (Okla. 2019) (Hudson, J., concurring).
[202] *See Foust*, 180 A.3d at 441 ("It was within the trial court's discretion to conclude that an individual who viciously took the lives of two innocent people is not entitled to be released into society at an earlier age, even with the reduced culpability recognized in *Roper*, *Graham*, and *Miller*.").

a sentence of LWOP.[203] By granting sentencing judges this discretion, the Court also granted them the power to use the commission of multiple offenses, or the commission of a brutal offense, to negate the principle that it is cruel and unusual to punish juveniles for their crimes, however many or however brutal, by denying them any opportunity to obtain release from prison, no matter how much they change.[204]

3. A Meaningful Opportunity for Release

In *Graham*, the Supreme Court stated that the sentences of juveniles who commit nonhomicide offenses must provide "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."[205] Most courts have disregarded the word "meaningful" in this statement, seeming to regard sentences as either providing an opportunity for release or not providing an opportunity for release. If a sentence provides an opportunity for release, few courts have

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[203] *See* Miller v. Alabama, 567 U.S. 460, 489 (2012) ("Discretionary sentencing in adult court would provide different options . . . ."); *id.* ("[T]he discretion available to a judge at the transfer stage cannot substitute for discretion at post-trial sentencing in adult court . . . ."); *id.* at 465 ("In neither case did the sentencing authority have any discretion to impose a different punishment."); Jones v. Mississippi, 141 S. Ct. 1307, 1318 (2021) ("The key assumption of both *Miller* and *Montgomery* was that discretionary sentencing allows the sentencer to consider the defendant's youth, and thereby helps ensure that life-without-parole sentences are imposed only in cases where that sentence is appropriate in light of the defendant's age.").

[204] Some courts have recognized that an aggregated LWOP sentence is the same as an LWOP sentence for a single offense, in terms of the severity of the sentence. *See, e.g.*, State v. Moore, 76 N.E.3d 1127, 1142 (Ohio 2016) ("The nature or number of the crimes he committed was less important than who he was at the time he committed them: a juvenile whose age, coupled with his commission of nonhomicide crimes, left him with 'limited moral culpability' such that he could not be condemned at the outset to a lifetime of imprisonment without any hope for release." (quoting Graham v. Florida, 560 U.S. 48, 74 (2010)); *id.* at 1143 ("The number of offenses committed cannot overshadow the fact that it is a child who has committed them."); State v. Zuber, 152 A.3d 197, 212 (N.J. 2017) ("To be clear, we find that the force and logic of *Miller*'s concerns apply broadly: to cases in which a defendant commits multiple offenses during a single criminal episode; to cases in which a defendant commits multiple offenses on different occasions; and to homicide and non-homicide cases.").

[205] 560 U.S. at 75. The Court's opinion in *Miller* repeated this statement, although in a "Cf" parenthetical after stating that mandatory LWOP sentences are prohibited: "We therefore hold that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders. *Cf. Graham*, 560 U.S., at 75 ("A State is not required to guarantee eventual freedom," but must provide "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation")." *Miller*, 567 U.S. at 479.

considered whether the opportunity is "meaningful."[206]

This omission is understandable for several reasons. First, the Court did not explain what it meant by "meaningful": what is a meaningful opportunity for release, and how does it differ from a meaningless opportunity for release? Additionally, it would be reasonable for courts to conclude that a meaningful opportunity for release is more a matter of parole administration than of sentencing.[207] Not surprisingly, the Court's decisions in *Graham* and *Miller* have sparked scholars' interest in the administration of systems of parole.[208]

Some courts, however, have interpreted "meaningful opportunity for release" to relate to the quality of life that a juvenile offender might expect to have if eventually granted parole. These courts consider not only whether a sentence provides the opportunity to be released within the juvenile offender's expected lifetime but also whether the sentence provides the opportunity to be released at an age that allows for a meaningful life outside of prison.[209] These courts are especially likely to

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[206] The Supreme Court considered the question of "geriatric release" in a habeas case, which requires deference to state courts and allows federal courts to find error only in extreme cases, and decided that a Virginia court was not "objectively unreasonable" (the habeas standard) in concluding that a state statute that provides the opportunity for release at age 60 or 65 satisfied the "meaningful opportunity requirement: "[I]t was not objectively unreasonable for the state court to conclude that, because the geriatric release program employed normal parole factors, it satisfied *Graham*'s requirement that juveniles convicted of a nonhomicide crime have a meaningful opportunity to receive parole." Virginia v. LeBlanc, 582 U.S. 91, 94-95 (2017) (per curiam).

[207] The Supreme Court of North Carolina recently explained: "A juvenile offender's opportunity for parole, in light of the sentencing authority's determination that the defendant is neither incorrigible nor irredeemable but is instead worthy to have a chance for release to parole, must be an opportunity which is realistic, meaningful, and achievable. The opportunity must be implementable, instead of amounting to a mere formal announcement of a juvenile sentence allowing the possibility of parole, but which in reality is illusory and only elevates form over substance." State v. Conner, 873 S.E.2d 339, 356 (N.C. 2022).

[208] *See generally* Beth Caldwell, *Creating Meaningful Opportunities for Release:* Graham*,* Miller *and California's Youth Offender Parole Hearings*, 40 N.Y.U. REV. L. & SOC. CHANGE 245 (2016); Sarah French Russell, *Review for Release: Juvenile Offenders, State Parole Practices, and the Eighth Amendment*, 89 IND. L.J. 373 (2014); Kristen Bell, *A Stone of Hope: Legal and Empirical Analysis of California Juvenile Lifer Parole Decisions*, 54 HARV. C.R.-C.L. L. REV. 455 (2019); Matthew Drecun, *Cruel and Unusual Parole*, 95 TEX. L. REV. 707 (2017); Harrington, *supra* note 17; Laura Cohen, *Freedom's Road: Youth, Parole, and the Promise of* Miller v. Alabama *and* Graham v. Florida, 35 CARDOZO L. REV. 1031 (2014).

[209] These courts have accepted various ages as allowing for the possibility of sufficient time outside of prison for a meaningful life. In *Null*, the Iowa Supreme Court determined that *Miller* prohibited a mandatory sentence of 50 years. State v. Null, 836 N.W.2d 41,

appreciate the importance of corrigibility. For example, the Supreme Court of Ohio stated: "The court in *Graham* did not establish a limit to how long a juvenile can remain imprisoned before getting the chance to demonstrate maturity and rehabilitation. But it is clear that the court intended more than to simply allow juveniles-turned-nonagenarians the opportunity to breathe their last breaths as free people. The intent was not to eventually allow juvenile offenders the opportunity to leave prison in order to die but to live part of their lives in society."[210] Similarly, the Supreme Court of Connecticut stated: "The United States Supreme Court viewed the concept of 'life' in *Miller* and *Graham* more broadly than biological survival; it implicitly endorsed the notion that an individual is effectively incarcerated for 'life' if he will have no opportunity to truly reenter society or have any meaningful life outside of prison."[211]

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76 (Iowa 2013) ("We emphasize that the sole issue on remand is whether Null may be required to serve 52.5 years in prison before he is eligible for parole consideration."). For comprehensive discussion of this issue, see generally Caldwell, *supra* note 208.

Additionally, some state legislatures have provided for the opportunity for release to all (or most) juveniles after serving some specific number of years: West Virginia (all juveniles eligible for parole after 15 years); Delaware (all juveniles sentenced to more than 20 years may petition the court for a sentence modification); California (all juveniles except those sentenced to LWOP eligible for parole after 15 years); Nevada (all juveniles except those who committed homicides involving more than one victim eligible for parole after 15 or 20 years). *See* Sarah French Russell & Tracy L. Denholtz, *Procedures for Proportionate Sentences: The Next Wave of Eighth Amendment Noncapital Litigation*, 48 CONN. L. REV. 1121, 1163 (2016).

[210] State v. Moore, 76 N.E.3d 1127, 1137 (Ohio 2016). *See also* People v. Buffer, 137 N.E.3d 763, 772 (Ill. 2019) ("Practically, and ultimately, the prospect of geriatric release does not provide a juvenile with a meaningful opportunity to demonstrate the maturity and rehabilitation required to obtain release and reenter society."); State v. Kelliher, 873 S.E.2d 366, 381 (N.C. 2022) ("Allowing a juvenile the opportunity to be released on parole only after spending fifty years in prison denies the defendant the right to reenter the community in any meaningful way.") (alteration and internal quotation marks omitted).

[211] Casiano v. Comm'r of Corr., 115 A.3d 1031, 1047 (Conn. 2015). The court further explained:

> A juvenile offender is typically put behind bars before he has had the chance to exercise the rights and responsibilities of adulthood, such as establishing a career, marrying, raising a family, or voting. Even assuming the juvenile offender does live to be released, after a half century of incarceration, he will have irreparably lost the opportunity to engage meaningfully in many of these activities and will be left with seriously diminished prospects for his quality of life for the few years he has left. A juvenile offender's release when he is in his late sixties comes at an age when the law presumes that he no longer has productive employment prospects.

Id. at 1046.

III. THE FUTURE OF CORRIGIBILITY

A. Direct and Indirect Effects of the Supreme Court's Juvenile Sentencing Cases

Given the Court's opinion in *Jones*, which minimized the constitutional importance of juveniles' capacity for change, *Miller*'s prohibition of mandatory LWOP sentences is likely to be the Court's last extension of the principle that corrigibility matters to sentencing.[212] Despite failing to secure protection from sentences of LWOP for all juvenile offenders, the Court's decisions in *Roper*, *Graham*, and *Miller* did result in important advances toward making the sentencing of juvenile offenders less hopelessly and pointlessly punitive. Some of these advances were the direct result of the Court's decisions: all juvenile offenders are excluded from the death penalty,[213] and juveniles who commit nonhomicide offenses are excluded from LWOP sentences.[214] For juveniles who commit homicide offenses, the consequences of the Court's decisions are less certain. Undoubtedly, *Miller* will protect some—but not all—juvenile offenders from LWOP sentences; for example, the Court in *Jones* observed that even in Mississippi, approximately 75 percent of juvenile offenders who were resentenced following *Miller* were given a lesser sentence than LWOP.[215]

Going forward, the fate of a juvenile who has committed a homicide offense will depend to some extent on the sentencing judge's views of corrigibility. Some judges will be motivated to reserve LWOP sentences for juveniles whom they believe to be "permanently incorrigible," either because these judges agree that LWOP is cruel and unusual punishment for a corrigible juvenile offender or because they believe that this is what *Miller* requires. But for juvenile offenders who

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[212] *See supra* Part I.F.

[213] Roper v. Simmons, 543 U.S. 551, 578 (2005).

[214] Graham v. Florida, 560 U.S. 48 (2010).

[215] Jones v. Mississippi, 141 S. Ct. 1307, 1322 (2021) ("[I]n *Miller* resentencings in Mississippi where Jones was convicted and sentenced, *Miller* has reduced life-without-parole sentences for murderers under 18 by about 75 percent."). On the other hand, as the dissenting opinion noted, fewer than two percent of juvenile offenders were resentenced to LWOP in Pennsylvania, which had adopted a more rigorous approach to *Miller* than Mississippi's. *Id.* at 1333–34 (Sotomayor, J., dissenting) ("Unbound by *Miller*'s essential holding, more than a quarter of Mississippi's resentencings have resulted in the reimposition of LWOP. . . . Pennsylvania has adopted a number of procedures to guide sentencing courts in applying *Miller*'s rule, including a presumption against juvenile LWOP that the State must rebut through proof beyond a reasonable doubt. Fewer than 2 percent of resentencings in Pennsylvania have resulted in the reimposition of LWOP.") (citations omitted).

are sentenced to LWOP by judges who disagree with the principle of *Miller*, that corrigible juveniles should not be sentenced to LWOP, there is little that the federal courts will be able to do, given the Court's decision in *Jones*.[216] Juveniles who are sentenced to LWOP after individualized sentencing hearings that take account of the mitigating effects of youth have likely received all of the protections that the Eighth Amendment requires, at least as construed by the *Jones* Court.

The sentencing-factors approach to corrigibility that the Supreme Court endorsed in *Jones* gives sentencing judges a degree of discretion that is problematic, not only because it means that judges can impose LWOP sentences despite evidence of capacity for change[217] but also because it opens the door to sentencing disparities.[218] Although judges need some degree of discretion to impose sentences fairly, based on facts and circumstances of individual cases, too much discretion produces its own kind of unfairness, in the form of disparate sentences for similar offenses.[219] Moreover, individualized decisions are likely to result not in randomly disparate sentences but instead in racially disparate sentences.[220]

More positively, and despite the setback of *Jones*, the Court's

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[216] *See, e.g.*, United States v. Briones, 18 F.4th 1170, 1174 (9th Cir. 2021).

[217] *See* supra Part III.A.

[218] *See* Hannah Duncan, *Youth Always Matters: Replacing Eighth Amendment Pseudoscience with an Age-Based Ban on Juvenile Life Without Parole*, 131 YALE L.J. 1936, 1959 (2022). The unfairness of sentencing disparities was one reason for the demise of rehabilitation as a sentencing goal. *See* KATHLEEN DEAN MOORE, PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST 71 (1989) ("Rehabilitation justified individualized sentences, individualized sentences justified discretion, and discretion resulted in enormous disparities between sentences for similar crimes.").

[219] *See* Benjamin R. King, *Departures from the Federal Sentencing Guidelines Based on Prior Dissimilar Nonconvicted Conduct: A Call for a Finding of Relatedness*, 72 S. CAL. L. REV. 899, 910 (1999) ("[T]he history of sentencing practice exposes a fundamental tension between the desire to view each offender as a unique individual deserving of specific consideration and the desire to construct and maintain a sentencing system that promotes uniformity and fairness through minimal sentence disparity among like offenders."). For a comprehensive recent discussion of the dangers of discretionary sentences, particularly with respect to juvenile offenders, see generally Kathryn E. Miller, *Resurrecting Arbitrariness*, 107 CORNELL L. REV. 1319 (2022).

[220] *See* Marshall, *supra* note 73, at 1661 ("Another serious concern with predictions about juveniles is racial bias."); Alice Reichman Hoesterey, *Confusion in* Montgomery*'s Wake: State Responses, the Mandates of* Montgomery*, and Why a Complete Categorical Ban on Life Without Parole for Juveniles Is the Only Constitutional Option*, 45 FORDHAM URB. L.J. 149, 183 (2017) ("The inconsistent imposition of juvenile life without parole will inevitably have a significant discriminatory impact on juveniles of color, especially African American youth.").

decisions in *Roper*, *Graham*, and *Miller* have inspired an assortment of reforms related to the sentencing of juvenile offenders, in terms of both state court decisions and state legislative enactments. In particular, several state courts have interpreted state constitutional provisions to provide broader protections against juvenile LWOP sentences than the United States Supreme Court has required under the U.S. Constitution. For example, the North Carolina Supreme Court has decided, in the exercise of its own "independent judgment," that LWOP is a cruel and unusual punishment for all juveniles.[221] Additionally, some state legislatures have eliminated LWOP sentences for all juveniles, as well as enacted various other reforms, such as eliminating the automatic transfer of juvenile offenders to adult courts, limiting discretionary transfers, and expanding the jurisdiction of juvenile courts.[222]

B. The Special Persuasiveness of Juvenile Brain Science

The Supreme Court cited scientific studies to an unprecedented extent in its Eighth Amendment juvenile sentencing cases.[223] On one

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[221] State v. Kelliher, 873 S.E.2d 366, 387 (N.C. 2022).

[222] *See* Cara H. Drinan, *The* Miller *Trilogy and the Persistence of Extreme Juvenile Sentences*, 58 AM. CRIM. L. REV. 1659, 1659, 1666 (2021); Ingrid Yin, *Young and Dangerous: The Role of Youth in Risk Assessment Instruments*, 120 MICH. L. REV. 545, 564–65 (2021).

[223] *Cf.* Cheryl B. Preston & Brandon T. Crowther, *Legal Osmosis: The Role of Brain Science in Protecting Adolescents*, 43 HOFSTRA L. REV. 447, 462 (2014) ("The Supreme Court grabbed science with both hands when shaping the juvenile justice legal policies. The Supreme Court in *Roper*, *Graham*, and *Miller* used developmental science to conclude that juveniles are less culpable than adults and more likely to be deterred from future crime."); Emily Graham, *Emerging Adults in the Federal System: A Case for Implementing the Federal Youth Corrections Act*, 11 HARV. L. & POL'Y REV. 619, 620–21 (2017) ("The Supreme Court has embraced the legitimacy of developmental neuroscience in a series of recent cases concerning the constitutionality of sentencing juveniles to capital punishment and life in prison without the possibility of parole. . . . In all of these cases, the Supreme Court cited neuroscience research for the proposition that juveniles are fundamentally different from adults in certain key aspects."); Esther K. Hong, *A Reexamination of the* Parens Patriae *Power*, 88 TENN. L. REV. 277, 292 (2021) (discussing the cases from *Roper* to *Montgomery* as the beginning of a new era of juvenile law, "where courts take the developmental differences in children into account for constitutional doctrinal purposes"). Some scholars have criticized the Court's reliance on scientific studies in these cases. *See* Reginald Dwayne Betts, *What Break Do Children Deserve? Juveniles, Crime, and Justice Kennedy's Influence on the Supreme Court's Eighth Amendment Jurisprudence*, 128 YALE L.J. FORUM 743, 755–56 (2019) ("In the wake of the Supreme Court's shift in Eighth Amendment jurisprudence around sentences for juveniles convicted of violent crimes, some scholars have acknowledged that the argument regarding the science of brain development—the foundation for why juveniles should be treated differently—is tenuous.").

hand, the Court's use of scientific evidence was problematic, especially its citations to evidence that some juvenile offenders continue to commit crimes as adults to support its assertions that some juvenile offenders are "irretrievably depraved" or "irreparably corrupt."[224] On the other hand, the Court appropriately used scientific evidence to support its statements that juveniles as a group have a special capacity for change. In *Graham*, the Court stated: "[D]evelopments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence."[225] The Court in *Miller* repeated this statement and then added, quoting from the amicus brief of the American Psychological Association: "It is increasingly clear that adolescent brains are not yet fully mature in regions and systems related to higher-order executive functions such as impulse control, planning ahead, and risk avoidance."[226]

Many of the state courts that are taking corrigibility seriously have followed the Supreme Court in citing scientific research findings to support their statements that juveniles are especially capable of change.[227] For example, several courts have cited scientific evidence of ongoing brain development during adolescence to support a presumption that all juveniles are capable of change. As the North Carolina Supreme Court stated: "[B]ased on the science of adolescent brain development that this Court has previously recognized and our constitutional commitments to rehabilitating criminal offenders and nurturing the potential of all of North Carolina's children, we also conclude that juvenile offenders are presumed to have the capacity to change."[228]

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[224] *See supra* Part I.D.1.

[225] Graham v. Florida, 560 U.S. 48, 68 (2010) (citing Brief for Am. Med. Ass'n et al. as Amicus Curiae in Support of Neither Party pp. 16–24, *Graham*, 560 U.S. 48 (Nos. 08-7412, 08-7621); Brief for Am. Psych. Ass'n et al. as Amicus Curiae in Support of Petitioners pp. 22–27, *Graham*, 560 U.S. 48 (Nos. 08-7412, 08-7621)).

[226] Miller v. Alabama, 567 U.S. 460, 472 n.5 (2012) (quoting Brief for Am. Psych. Ass'n et al. as Amicus Curiae Supporting Petitioners p. 4, Miller v. Alabama, 567 U.S. 460 (2012) (Nos. 10-9646, 10-9647)).

[227] *See, e.g.*, Dorsey v. State, 975 N.W.2d 356, 365, 371 (Iowa 2022) (Appel, J., dissenting) ("We have embraced the Supreme Court's rationale in *Roper*, *Graham*, and *Miller* and further extended application of the role of neuroscience and social psychology in considering whether certain punishments of juveniles under the age of eighteen constitutes cruel and unusual punishment under the Iowa Constitution.").

[228] State v. Kelliher, 873 S.E.2d 366, 387 (N.C. 2022). *Accord* People v. Taylor, No. 154994, 2022 WL 3008301, at *11 (Mich. July 28, 2022) (ruling that state law creates a "presumption that the particular juvenile defendant is not deserving of LWOP," which a prosecutor must rebut by clear and convincing evidence).

Other courts have used juvenile brain science to support a categorical exclusion from a sentence of LWOP for all juveniles. For example, the Iowa Supreme Court stated: "[T]he enterprise of identifying which juvenile offenders are irretrievable at the time of trial is simply too speculative and likely impossible given what we now know about the timeline of brain development and related prospects for self-regulation and rehabilitation."[229]

The Michigan Supreme Court relied extensively on juvenile brain science to extend the prohibition of mandatory LWOP sentences to 18-year-old offenders:

> Because of the dynamic neurological changes that late adolescents undergo as their brains develop over time and essentially rewire themselves, automatic condemnation to die in prison at 18 is beyond severity—it is cruelty. The brains of 18-year-olds, just like those of their juvenile counterparts, transform as they age, allowing them to reform into persons who are more likely to be capable of making more thoughtful and rational decisions. . . . All of this suggests that 18-year-olds, much like their juvenile counterparts, are generally capable of significant change and a turn toward rational behavior that conforms to societal expectations as their cognitive abilities develop further.[230]

Similarly, the Washington Supreme Court cited neuroscience research in support of its decision to extend the prohibition to offenders under the age of 21:

> Neuroscientists now know that all three of the general differences between juveniles under 18 and adults recognized by *Roper* are present in people older than 18. . . . [W]e deem these objective scientific differences between 18- to 20-year-olds (covering the ages of the two petitioners in this case) on the one hand, and persons with fully developed brains on the other hand, to be constitutionally significant. . . .[231]

[229] State v. Sweet, 879 N.W.2d 811, 836–37 (Iowa 2016).

[230] People v. Parks, No. 162086, 2022 WL 3008548, at *16 (Mich. July 28, 2022).

[231] Matter of Monschke, 482 P.3d 276, 286 (Wash. 2021) (en banc) (internal quotation marks omitted). Other courts have acknowledged the persuasiveness of juvenile brain science even when declining to base their decisions on this research. *See, e.g.*, Commonwealth v. Bredhold, 599 S.W.3d 409, 423 (Ky. 2020) ("Should [an appellee be sentenced to death], this Court anticipates that the evidentiary record regarding the psychological and neurobiological characteristics of offenders under twenty-one (21) years old generally, as well as of the Appellee specifically, will be fully developed by all parties and both the trial court and this Court will have the scientific evidence necessary to address a truly justiciable constitutional issue."); People v. Sanchez, No. 2911463 at 6 (N.Y. Sup. Ct. Apr. 16, 2019) ("Research on adolescent brain development does not support drawing Eighth Amendment lines at age 18, as opposed to, for example, 19, 20

Courts that have relied on juvenile brain science have tended to draw the proper legal conclusions with respect to corrigibility: evidence that juveniles generally experience relatively dramatic changes in brain structure and function during adolescence can support rules that apply categorically to all juveniles based on an assumption that all juveniles are capable of change.[232] Although not all juvenile offenders will change, there is no scientific support for an assumption that some juveniles are incapable of change.[233]

Perhaps the most difficult and far-reaching question is the one raised by the Michigan Supreme Court's decision to extend to 18-year-olds the prohibition against mandatory sentences of LWOP.[234] The brain development that occurs during adolescence has no clear end point, so at what age should courts say that people are no longer entitled to the special protections afforded to juveniles? The Michigan Supreme Court declined to say how far it believed the protections should extend, ruling only that however far that is, it includes 18-year-olds.[235] This suggests that the Court anticipates drawing the line somewhere. But another answer is that LWOP is a cruel and unusual punishment for everyone. It might be especially cruel to sentence juvenile or young adult offenders to prison sentences that deny them any opportunity to someday demonstrate that they are no longer the same people who committed their crimes, but numerous scholars have argued that the denial of this opportunity amounts to a denial of the humanity of every person, no matter how old.[236] This is

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or 21.").

[232] The risk of juvenile brain science is that courts will use evidence of general tendencies to make conclusions about specific individuals. Juvenile brain science can tell us about juveniles as a group but it cannot tell us about individual juveniles. *See generally* Faigman & Geiser, *supra* note 73.

[233] Which is not to say that juvenile brain science should serve as the sole basis for answering legal questions regarding the criminal punishment of juveniles. *See* Jenny E. Carroll, *Brain Science and the Theory of Juvenile Mens Rea*, 94 N.C. L. REV. 539, 594 (2016) ("To recognize that adolescent brain science is relevant to mens rea, however, invites the practical question of what precise role such science should play in the litigation of a particular criminal case. This is a problem with no easy solution."). On the other hand, while brain science should not be viewed as providing direct or complete answers to legal questions, neither should it be ignored.

[234] *Parks*, 2022 WL 3008548, at *16.

[235] *Id.*

[236] *See* Carter, López & Songster, *supra* note 104, at 341 ("[I]t is inhuman to imprison a person for life without the hope of release.") (internal quotation marks omitted); Judith Lichtenberg, *Against Life Without Parole*, 11 WASH. U. JURIS. REV. 39, 64 (2018) ("What is the point of punishing a person who recognizes the wrongness of what he has done, who no longer identifies with those acts, and who bears little resemblance to the person he was so many years earlier? It's tempting to say he is no longer the same person.")

a conclusion that is also supported by brain science. Although the human brain undergoes a particularly dramatic change in structure and function during adolescence, there is no age at which the brain stops changing altogether.[237]

CONCLUSION

The Supreme Court's identification of corrigibility as a basis for deciding that a sentence of LWOP is a cruel and unusual punishment for juvenile offenders is an important insight. Although the Court did not follow this insight to its logical end—that all LWOP sentences for juveniles are prohibited by the Eighth Amendment—the principle that corrigibility matters to sentencing has provided state courts and legislatures with a tool for addressing the excessively harsh criminal punishment of juvenile offenders, and perhaps eventually even all offenders. People are generally capable of change, and juveniles are especially capable of change. This capacity for change should be taken seriously in assessing the appropriateness of criminal punishments.

(emphasis omitted); Michael M. O'Hear, *The Beginning of the End for Life Without Parole?*, 23 FED. SENT'G REP. 1, 7 (2010) ("If the capacity for change and moral growth is regarded as a core attribute of humanity, then LWOP might be seen as a profoundly inhumane punishment—as a denial of the offender's capacity to live a fully realized human life."); Chad Flanders, *The Supreme Court and the Rehabilitative Ideal*, 49 GA. L. REV. 383, 429 (2015) ("[C]ontemporary moral reform theorists tend to insist that we should not treat any person 'beyond civic redemption.' If this is right, the rehabilitation as a purpose of punishment cannot be limited to sentences that involve juveniles. Whether a punishment leaves open the possibility of moral reform should be a constraint on all punishments: we should not give up on anybody.") (footnote omitted).

Courts have also noted the extreme harshness of an LWOP sentence. *See* Graham v. Florida, 560 U.S. 48, 79 (2010) ("Life in prison without the possibility of parole gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope."); Naovarath v. State, 779 P.2d 944, 944 (Nev. 1989) (noting that an LWOP sentence "means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the convict], he will remain in prison for the rest of his days") (quoted by *Graham*, 560 U.S. at 70) (alteration in original).

[237] *See* Stephen J. Morse, *Brain Overclaim Redux*, 31 L. & INEQ. 509, 520-21 (2013) ("Brain maturation continues into the mid-twenties and the brain is plastic and always changing."); M. Eve Hanan, *Incapacitating Errors: Sentencing and the Science of Change*, 97 DENV. L. REV. 151, 171 (2019) ("Research in multiple fields demonstrates that change in adulthood is the norm rather than the exception, and that these changes occur not just in response to the aging process but in response to environmental stimuli at any point in life."); Kari Mercer Dalton, *Their Brains on Google: How Digital Technologies Are Altering the Millennial Generation's Brain and Impacting Legal Education*, 16 SMU SCI. & TECH. L. REV. 409, 417 (2013) ("Neuroplasticity is constantly occurring.").

As the Supreme Court properly observed, not all juvenile offenders will change as they mature, and for those who do not, life in prison can be an appropriate sentence. But accepting that not all juvenile offenders will change is far different from accepting that some are incapable of change. Nothing that anyone knows—from "any parent"[238] to "trained psychiatrists"[239]—supports the conclusion that any juvenile offender is "permanently incorrigible." While the Supreme Court's recognition that corrigibility matters to sentencing has helped to correct some of the excessive punitiveness of criminal punishments, the Court's creation of the "irretrievably depraved" or "irreparably corrupt" juvenile should be recognized as scientifically—and constitutionally—unsound.

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[238] Roper v. Simmons, 543 U.S. 551, 569 (2005).
[239] *Id.* at 573.